No. 05-785
Title: Thomas L. Carey, Warden, Petitioner
v.
Mathew Musladin
Docketed: December 19, 2005
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (03-16653)
Decision Date: October 21, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Dec 15 2005	Petition for a writ of certiorari filed. (Response due January 18, 2006)
Jan 11 2006	Waiver of right of respondent Mathew Musladin to respond filed.
Jan 25 2006	DISTRIBUTED for Conference of February 17, 2006.
Feb 6 2006	Response Requested . (Due March 8, 2006)
Mar 7 2006	Brief of respondent Mathew Musladin in opposition filed.
Mar 7 2006	Motion for leave to proceed in forma pauperis filed by respondent.
Mar 17 2006	Reply of petitioner Thomas L. Carey, Warden filed.
Mar 22 2006	DISTRIBUTED for Conference of April 14, 2006.
Apr 17 2006	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Apr 17 2006	Petition GRANTED.
May 17 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including June 22, 2006.
Jun 22 2006	Joint appendix filed.
Jun 22 2006	Brief of petitioner Thomas L. Carey, Warden filed.
Jun 22 2006	Brief amicus curiae of New Jersey Crime Victims' Law Center filed.
Jun 22 2006	Brief amici curiae of National Crime Victim Law Institute, et al. filed.
Jun 22 2006	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Jun 22 2006	Brief amici curiae of Illinois, et al. filed.
Jul 3 2006	Extension of time within which to file respondent's brief on the merits to and including August 21, 2006.
Jul 3 2006	Motion to appoint counsel filed by respondent Mathew Musladin.
Jul 14 2006	SET FOR ARGUMENT on Wednesday, October 11, 2006.
Jul 25 2006	CIRCULATED.
Jul 27 2006	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Jul 28 2006	Record received from U.S.D. C. for Northern District of California. (1 envelope)
Aug 14 2006	SET FOR ARGUMENT on Wednesday, Octobert 11 2006.
Aug 21 2006	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Aug 21 2006	Brief of respondent Mathew Musladin filed. (Distributed)
Aug 23 2006	Motion DISTRIBUTED for Conference of September 25, 2006.
Sep 25 2006	Reply of petitioner Thomas L. Carey, Warden filed. (Distributed)
Oct 2 2006	Motion to appoint counsel filed by respondent GRANTED. David W. Fermino, Esquire,

	of San Francisco, California is appointed to serve as counsel for the respondent in this case.
Oct 11 2006	Argued. For petitioner: Gregory A.Ott, Deputy Attorney Geneal, San Francisco, Cal. For respondent: David W. Fermino, San Francisco, Cal. (Appointed by this Court.)

Supreme Court, U.S.
FILED
DEC 15 2005
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No. 05-785

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS L. CAREY, WARDEN, *Petitioner,*

v.

MATHEW MUSLADIN, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the absence of controlling Supreme Court law, did the Court of Appeals for the Ninth Circuit exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning respondent's state conviction of murder on the ground that the courtroom spectators included three family members of the victim who wore buttons depicting the deceased?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

THOMAS L. CAREY, WARDEN, *Petitioner,*

v.

MATHEW MUSLADIN, *Respondent.*

Thomas L. Carey,[1] Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 427 F.3d 653. Petition Appendix ("App.") 1a-18a. Its order denying rehearing and rehearing en banc is reported at 427 F.3d 647. App. 19a-30a. The opinion of the United States District Court for the Northern District of California denying the petition for writ of habeas corpus is unreported. App. 31a-54a. The opinion of the California Court of Appeal affirming the judgment of conviction, and its order denying rehearing, are unreported. App. 55a-78a, 80a. The orders of the California Supreme Court denying direct review and denying the petition for writ of habeas corpus are unreported. App. 79a, 81a.

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1. Musladin's custodian in the federal district court and court of appeals, Warden Anthony Lamarque, has retired. Musladin is presently in the custody of Warden Thomas L. Carey.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed on October 21, 2005. An order denying the Warden's petition for panel rehearing and rehearing en banc was filed on the same day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides that no state "shall deprive any person or life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2254(d)(1) provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[¶] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Pub. L. No. 104-132, § 104, 110 Stat. 1218.

STATEMENT OF THE CASE

1. In 1994, respondent Mathew Musladin was involved in a child custody dispute with his wife Pamela, from whom he had been separated for a year and a half. One afternoon shortly after Pamela's new boyfriend, Tom Studer, had begun living with her, Musladin came to Pamela's house ostensibly to pick up his young son for visitation. Pamela and Musladin met in front of the house, where Musladin shoved her to the ground. Studer and Pamela's brother Mike emerged from the house to help

Pamela. Musladin retrieved a handgun from his car, and shot Studer, hitting him in the shoulder and knocking him down. When Studer crawled into the garage attempting to escape, Musladin followed and shot him in the head as Studer lay on the floor, killing him. Musladin fled but was quickly arrested. App. 55a-58a.

Before trial, outside the presence of the jury, Musladin's counsel objected to spectators, members of Tom Studer's family, wearing buttons[2] that depicted Studer:

> [Defense counsel]: . . . . And this is about this matter and I just want to put on the record, Your Honor. This is in all due respect to the Studer family who is present here in the courtroom.
>
> I think it's inappropriate. They are wearing buttons that show a photograph of the decedent. I would like to just say for purposes of the record, Your Honor, this is a jury trial. If it was a court trial, I wouldn't mind. As jurors sit here, they have natural feelings and natural passions. They could be inflamed over the fact that there was a photograph on Ms. Studer's breast or photograph of the decedent on Mr. Studer's chest or on the brother's chest. I just think it's inappropriate, Your Honor. I would like to have – they can stay here. There is no problem with that.
>
> THE COURT: I understand that. The button has nothing except a photograph?
>
> [Prosecutor]: That's correct, Your Honor.
>
> THE COURT: The jury's already been instructed not to let passion or prejudice influence their verdict and they will again be instructed at the close of the case on the same subject. There is no legend on the buttons. I see no possible prejudice to the defendant. The motion to have those removed is denied.

App. 73a-74a.

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2. Neither the button nor the picture on it was in evidence, and neither one was seen by any court other than the state trial judge. *See* App. 73a-74a.

At trial, Musladin testified to shooting Studer in self-defense. App. 58a-60a. The jury convicted Musladin of first degree murder, attempted premeditated murder, first degree burglary, and assault with a firearm, with personal use of a firearm. He was sentenced to thirty-two years to life in prison. App. 33a, 55a.

2. The California Court of Appeal affirmed the judgment, rejecting Musladin's contention that the display of the spectators' buttons had deprived him of a fair trial. Citing *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986), the state appellate court found that Musladin had to show inherent prejudice from the presence of the buttons. "The test for inherent prejudice is . . . whether an unacceptable risk is presented of impermissible factors coming into play. This test requires us to examine two factors: first, whether there is an impermissible factor coming into play, and second, whether it poses an unacceptable risk." App. 74a (quoting *Woods v. Dugger*, 923 F.2d 1454, 1457 (11th Cir. 1991) (quoting *Flynn*, 475 U.S. at 570, and *Estelle v. Williams*, 425 U.S. 501 (1976))). Using that test the state court distinguished *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), which overturned a conviction where several female spectators had worn large buttons reading "Women Against Rape" at a rape trial. The state court held:

> the message to be conveyed by the Studer family wearing buttons is less than clear. The simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member. While we consider the wearing of photographs of victims in a courtroom to be an "impermissible factor coming into play," the practice of which should be discouraged, we do not believe the buttons in this case branded defendant "with an unmistakable mark of guilt" in the eyes of the jurors. (See *Holbrook* v. *Flynn*, *supra*, 475 U.S. at 570-571.)

App. 74a-75a. Rehearing was denied, and the California Supreme Court denied review. App. 79a-80a.

3. In 1999, Musladin filed a petition for writ of habeas corpus in the California Supreme Court. Musladin attached to his petition two declarations alleging facts outside the trial record: The buttons were between two and four inches in diameter, and were worn by Studer's mother, father, and brother, each of whom attended most or all of trial and sat in the front row of the gallery, behind the prosecutor. *See* App. 48a. The petition was denied without comment in 2000. App. 81a.

4. The same year, Musladin sought a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In denying relief, the district court noted that the Supreme Court has not specifically addressed spectator buttons and distinguished both *Estelle v. Williams*, 425 U.S. 501, which had held that compelling a defendant to wear jail clothing at trial violates the right to a fair trial, and *Norris v. Risley*, 918 F.2d 828, which had involved courtroom practices "related directly to the respective defendant's guilt." The district court found the "message to be derived from the buttons in this case . . . was not as clear" as that conveyed by the courtroom practices in *Estelle* and *Norris*. "Although it amounted to a showing of solidarity by the victim's family, it did not necessarily undermine the presumption of innocence." The district court concluded, "Although allowing the buttons was arguably not a prudent decision by the trial judge, it cannot be said that it was contrary to or an unreasonable application of clearly established federal law" as set forth in *Estelle*. App. 47a-50a, 54a.

5. On appeal, a divided panel of the Ninth Circuit reversed and directed issuance of the writ. *Musladin v. Lamarque*, 403 F.3d 1072 (9th Cir. 2005). The Warden filed a petition for rehearing with a suggestion for rehearing en banc.

6. On October 21, 2005, the Ninth Circuit substituted a new published opinion, without a change in the judgment. *See* App. 1a-15a. In an opinion authored by Circuit Judge Reinhardt, the Ninth Circuit held the state court's rejection of constitutional error in allowing the spectator's buttons was an unreasonable application of *Estelle v. Williams*, 425 U.S. 501, and *Holbrook*

v. Flynn, 475 U.S. 560. The Ninth Circuit accorded its pre-AEDPA decision in *Norris v. Risley*, 918 F.2d 828, "persuasive value" in deciding that the state court's application of *Estelle* and *Flynn* was unreasonable, particularly because the state court had discussed *Norris*. App. 7a-9a. *Norris*, according to Ninth Circuit, could not "reasonably be distinguished," for the "message conveyed" by the buttons in the present case was "even stronger and more prejudicial" than the "Women Against Rape" buttons worn by the *Norris* spectators. App. 8a, 13a. Specifically, the three buttons depicting Studer "essentially 'argue' that Studer was the innocent party and that the defendant was necessarily guilty; that the defendant, not Studer, was the initiator of the attack, and thus, the perpetrator of a criminal act." App. 13a. The Ninth Circuit additionally found that the state court unreasonably applied *Estelle* and *Flynn* by burdening Musladin with an unnecessary element of proof, namely, that the buttons "branded" Musladin with an "unmistakable mark of guilt." The federal appeals court held that once the state court found an "impermissible factor," reversal was required without Musladin having to show that he had been "branded." App. 10a-12a, 15a.

Senior Circuit Judge Thompson dissented, finding that the state court's decision was not contrary to nor an unreasonable application of established Supreme Court law. Judge Thompson found neither *Estelle* nor *Norris* sufficiently analogous to Musladin's case to compel relief, since the "message," if any, conveyed by the Studer family buttons was nothing more than the "normal grief occasioned by the loss of a family member." The state-court's reference to its view that the buttons had not "branded" Musladin, Judge Thompson explained, was simply shorthand for holding that the buttons were not so inherently prejudicial as to violate the defendant's right to a fair trial. App. 15a-18a.

7. On the same day, the Ninth Circuit denied the Warden's petition for rehearing and rehearing en banc in a published order. App. 19a. Judge Kleinfeld (joined by Judges Kozinski,

O'Scannlain, Tallman, Bybee, Callahan, and Bea) dissented. Judge Kleinfeld contended that the court had "effectively erased" 28 U.S.C. § 2254(d) and that the panel's inquiry should have begun and ended with the fact that no clearly established Supreme Court case holds "silent signals of affiliation by spectators in a courtroom deny a defendant due process by eroding his presumption of innocence." He criticized the court's wholesale substitution of *Norris*, to fill in conclusively a blank between the two remotely analogous "bookends," *Estelle* and *Flynn*. Judge Kleinfeld perceived a circuit split on the extent to which circuit or state court decisions may be relied upon to grant relief under 28 U.S.C. § 2254(d)(1) and anticipated the decision would confuse state courts, which will not know whether to follow circuit or Supreme Court law to avoid reversal on federal habeas corpus. He criticized the panel's narrow and unyielding interpretation of the effect of the buttons, explaining that spectator alliances with a defendant or the prosecution are common, not improper, and part and parcel of the constitutional guarantee of a public trial. App. 20a-29a. Judge Bea (joined by Judges Kozinski, O'Scannlain, and Kleinfeld) also dissented. Judge Bea opined that the court had erroneously treated an "inherently prejudicial" courtroom practice as structural error, contrary to *Estelle* and *Flynn*. App. 29a-30a.

8. On November 2, 2005, the Ninth Circuit granted the Warden's motion for a ninety-day stay of the mandate pending the filing of this petition.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit violated AEDPA by failing to defer to a state court decision that reasonably fits within the matrix of this Court's broad due-process standard, and by granting relief on the basis of its own Circuit law rather than on the law "clearly established" by the holdings of this Court's precedents. The need for certiorari review is heightened given the inconsistent positions of federal circuit courts on the relevance of circuit or

state authority as a basis for habeas relief under § 2254(d)(1). In addition, and in violation of *Woodford v. Visciotti*, the Ninth Circuit selectively parsed the state-court opinion to tease out what it mistakenly characterized as an incorrect standard employed by the state court. Finally, contrary to *Deck v. Missouri*, the Ninth Circuit erroneously conflated the notion of "inherent prejudice" with that of structural error, concluding that a finding of inherent prejudice requires reversal without further inquiry.

A. The Ninth Circuit Based Habeas Relief On Its Own Pre-AEDPA Circuit Case And Without Any Deference To The State Court's Opinion, In Violation of AEDPA

1. "A necessary condition for federal habeas relief here is that the state court's decision be 'contrary to, or involv[e] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Kane v. Espitia*, 126 S. Ct. 407, 408, 163 L. Ed. 2d 10, 12 (2005) (per curiam). In determining what constitutes clearly established federal law for purposes of § 2254(d)(1), only this Court's holdings from the time the state court rendered its decision—not dicta or circuit court authority—are controlling. *See Kane v. Espitia*, 126 S. Ct. at 408, 163 L. Ed. 2d at 12-13; *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). No Supreme Court authority addresses the constitutionality of spectators wearing buttons or like paraphernalia in a courtroom at a criminal defendant's trial. *See Kane v. Espitia*, 126 S. Ct. at 408, 163 L. Ed. 2d at 12-13.

2. The Ninth Circuit acknowledged, as the state court found, that *Estelle v. Williams*, 425 U.S. 501, and *Holbrook v. Flynn*, 475 U.S. 560, while not involving similar circumstances, provide the closest Supreme Court authority for reviewing a claim of constitutional error in permitting spectators to wear buttons at the defendant's trial. The relevant inquiry is whether

the challenged courtroom practice "was so inherently prejudicial that [the defendant] was thereby denied his constitutional right to a fair trial." *Flynn*, 475 U.S. at 570.

In *Estelle*, the Court held that forcing a defendant to wear prison clothes at trial is inherently prejudicial. 425 U.S. at 530 n.10. In *Flynn*, the Court held that the presence of several armed uniformed officers in the spectators' row directly behind the defendant is not inherently prejudicial. 475 U.S. at 568-69. To the extent these decisions relate at all to courtroom spectators wearing buttons depicting a deceased family member, they permit the States to apply a broad rule of due process. This Court has held that "[t]he more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). The question for the federal habeas court is whether the state court's decision fits within the overall "matrix" of this Court's prior decisions. *Id.* at 665; *see Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (per curiam) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous."); *Lockyer v. Andrade*, 538 U.S. at 76 (holding where the "precise contours" of Supreme Court law were unclear, state court decision was not unreasonable).

3. The federal appeals court failed to accord sufficient deference to the state court's judgment. The "message" a juror might glean from a button bearing only a photograph of the victim is a highly subjective matter. As the dissents below reflect, the state court's interpretation of the buttons as conveying nothing more than a family's grief, a matter not inherently prejudicial, was clearly within the *Estelle* "matrix" of reasonable outcomes. App. 17a-18a, 26a-27a, 49a; *see Yarborough v. Alvarado*, 541 U.S. at 665. Judge Thompson noted correctly that "it is difficult to distinguish this case from the routine situation of a deceased victim's family members, without buttons, sitting as a group in a courtroom during trial. Jurors in such a trial surely would recognize the group for what

it is." App. 17a; *accord* App. 26a-27a; *see Kinnamon v. Scott*, 40 F.3d 731, 734 (5th Cir. 1994). Tom Studer's family was bereaved by his death. That fact could manifest itself in tears or hand-holding or other displays just as much, if not more so, as in a small token of his likeness in tribute to his memory. Neither the emotion nor its manifestation would be any surprise to a jury. Families support loved ones, be they victims or defendants, aggressors or defenders. *See* App. 26a-27a.

Contrary to the "reason, principle, and common human experience" compelled by this Court's decisions, *Estelle v. Williams*, 425 U.S. at 504, the circuit court ignored even the possibility of more than one interpretation of an ordinary button bearing only a photograph. It found no reasonable jurist would disagree that the buttons conveyed the "clear and unmistakable" message that Musladin was guilty. App. 13a-14a. The opinions of the state court, the federal district court, and eight federal circuit judges show "fair-minded jurists could disagree" about that conclusion and reasonably so. *See Yarborough v. Alvarado*, 541 U.S. at 664. The decision of the Ninth Circuit plainly disregards the requirement of deferential review.

4. Not only did the Ninth Circuit ignore the requisite deference to the state court's opinion, it ignored AEDPA's requirement that the only source of clearly established law is that of this Court. The Ninth Circuit did not grant habeas relief based on an analysis or comparison of *Estelle* or *Flynn* to the instant case. Indeed, the circuit court did not juxtapose those decisions against Musladin's claim at all. *See* App. 6a-9a. Instead, the Ninth Circuit reversed Musladin's murder conviction based on its own pre-AEDPA decision in *Norris v. Risley*, 918 F.2d 828. In *Norris*, it concluded a rape defendant's right to a fair trial was violated because several spectators sat in the gallery during trial wearing "Women Against Rape" buttons. *See* App. 7a-9a, 13a-14a, 24a. Though *Norris* was decided under de novo review, as opposed to the "highly deferential" standard commanded by AEDPA, *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam), the Ninth Circuit suggested

that *Norris* was *particularly compelling precedent* because the state court had discussed and distinguished it in Musladin's direct appeal. *See* App. 8a-9a. This Court has never suggested, in or out of AEDPA's context, that if a state court discusses lower court authority it is somehow bound to follow that authority. A state court need not cite or even be aware of applicable *Supreme Court* authority. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). Since circuit authority is not controlling under § 2254(d)(1), surely a state court may ignore, address, or even misapply circuit law without thereby suffering reversal under § 2254(d)(1).

The Ninth Circuit's wholesale reliance on *Norris* is strikingly similar to its reliance on circuit authority condemned in *Kane v. Espitia*, 126 S. Ct. 407, 163 L. Ed. 2d at 13. In *Kane v. Espitia*, this Court reversed the Ninth Circuit's grant of habeas relief which the Ninth Circuit had based on circuit authority that a self-represented defendant has a constitutional right to access to law materials. 126 S. Ct. at 408-09, 163 L. Ed. 2d at 12-13. This Court explained that *Faretta v. California*, 422 U.S. 806 (1975) had "clearly established" a defendant's Sixth Amendment right to self-representation, but had said "nothing about any specific legal aid that the State owes a *pro se* criminal defendant." *Kane v. Espitia*, 126 S. Ct. at 408, 163 L. Ed. 2d at 13. In the AEDPA context the disagreement among circuit courts on whether *Faretta* implied such an access right was simply irrelevant since *Faretta*'s silence on the point barred habeas relief. *See Kane v. Espitia*, 126 S. Ct. at 408, 163 L. Ed. 2d at 13. In the present case, the Ninth Circuit, again, disregarded a void in established Supreme Court law, and followed its own circuit decisional authority. As certiorari was warranted in *Kane v. Espitia*, it is warranted here.

5. Certiorari is also warranted to resolve the confusion that otherwise will result from the Ninth Circuit's decision. As Judge Kleinfeld pointed out in his dissent, the opinion creates uncertainty for the state courts in that circuit, which will be unsure whether Ninth Circuit precedent is binding in criminal

cases within those jurisdictions. Judge Kleinfeld cogently argued that the panel's decision effectively turns the Ninth Circuit into "the Supreme Court of the nine states in our circuit." App. 28a-29a.

The Ninth Circuit's ongoing analytical approach of resorting to its own decisional authority as an adequate ground for overturning criminal judgments in AEDPA cases demonstrates that the role of lower court authority in determining what is "reasonable" under § 2254(d)(1) requires definitive resolution. This Court has indicated that the existence of circuit and state cases reaching the same result as the state court "under similar circumstances" may confirm that a state court's decision was reasonable. *Price v. Vincent*, 538 U.S. 634, 643 & n.2 (2003). Circuit decisions are not entirely consistent on the proper analysis. Some circuits find that lower federal court decisions are instructive on whether a given application of Supreme Court authority is reasonable. *See, e.g., Ouber v. Guarino*, 293 F.3d 19, 26-27 (1st Cir. 2002) ("it is helpful to examine precedents from lower federal courts to determine how the general standard applies to a particular set of facts"); *Matteo v. Superintendent*, 171 F.3d 877, 890 (3d Cir. 1999) (federal courts not "precluded from considering the decisions of the inferior federal courts when evaluating whether the state court's application of the law was reasonable"); *Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003) ("the objective reasonableness of a state court's application of Supreme Court precedent may be established by showing other circuits having similarly applied the precedent"). Other circuits are more restrictive in their application of lower court authority in reviewing state-court judgments, essentially treating such authority as "dicta." *See, e.g., Mitzel v. Tate*, 267 F.3d 524, 531 (6th Cir. 2001) ("We may not look to the decisions of our circuit, or other courts of appeals, when 'deciding whether the state court decision is contrary to, or an unreasonable application of, clearly established federal law.'"); *Bell v. Jarvis*, 236 F.3d 149, 162 (4th Cir. 2000) ("any independent opinions we offer on the merits of the

constitutional claims will have no determinative effective in the case before us, nor any precedential effect for state courts in future cases. At best, it constitutes a body of constitutional dicta."); *Bocian v. Godinez*, 101 F.3d 465, 471 (7th Cir. 1996) ("Federal courts are no longer permitted to apply their own jurisprudence, but must look exclusively to Supreme Court caselaw.").

Despite inconsistency among the federal courts, there appears to be no authority supporting the Ninth Circuit's view that a pre-AEDPA circuit decision by itself may dictate that a given state court decision was an unreasonable application of Supreme Court authority under § 2254(d)(1). This Court should grant certiorari to make clear that the use of circuit authority *qua* established Supreme Court law is contrary to § 2254(d)(1).

B. The Ninth Circuit Selectively and Unreasonably Interpreted the State Court Opinion

1. "Shorthand" or even "imprecise" recitations of an applicable standard by a state court do not invalidate that court's reasoning so long as the "fair import" of the court's decision is that the correct standard was applied. *Woodford v. Visciotti*, 537 U.S. at 24. "Formulary statements" of an applicable standard need not be given by a state court for its opinion to withstand scrutiny under 28 U.S.C. § 2254(d)(1). *Early v. Packer*, 537 U.S. at 9. To conclude otherwise would be inconsistent with the presumption that state courts know and follow the law, as well as § 2254(d)'s "'highly deferential standard for evaluating state-court rulings,'" which "demands that state court decisions be given the benefit of the doubt." *Visciotti*, 537 U.S. at 24 (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 (1997)).

The Ninth Circuit flouted the foregoing directions of this Court. The Ninth Circuit interpreted the opinion of the state court to have "imposed an additional and unduly burdensome requirement" on Musladin: "demanding that the challenged

practice cause the 'brand[ing]' of the defendant with an 'unmistakable mark of guilt[]' – even thought the *Williams* test for inherent prejudice had already been met." App. 10a. That interpretation of the state-court's decision by the federal circuit court exemplifies a "readiness to attribute error" rejected by this Court as inappropriate under AEDPA. *Woodford v. Visciotti*, 537 U.S. at 24.

Moreover, the Ninth Circuit plainly misread the opinion by the state court. In its appellate decision the state court set forth the correct standard for evaluating Musladin's claim, and identified the most closely applicable cases of this Court, *Estelle v. Williams*, 425 U.S. 501 and *Holbrook v. Flynn*, 475 U.S. 560. App. 9a; *see* App. 74a-75a. After finding the "simple photograph" of the victim on the buttons "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member," the state court concluded: "While we consider the wearing of photographs of victims in a courtroom to be an '*impermissible factor coming into play*,' the practice of which should be discouraged, *we do not believe the buttons in this case branded defendant 'with an unmistakable mark of guilt' in the eyes of the jurors*." App. 75a (quoting *Holbrook v. Flynn*, 475 U.S. at 570-71) (emphasis added).

Seizing on that last sentence, the federal circuit court ascribed to the state court a finding not merely of an "unacceptable risk" of "impermissible factors coming into play," but a finding that an "impermissible factor" *had* come into play, and thus that inherent prejudice had been established. The Ninth Circuit reasoned that having found inherent prejudice, the state court erroneously required Musladin additionally to show the buttons had branded him with an unmistakable mark of guilt. App. 10a.

This highly strained interpretation of the state court's opinion is neither reasonable nor consistent with AEDPA. As Judge Thompson cogently observed, "the state court's 'impermissible factor' comment is most reasonably understood as reflecting that court's view that buttons bearing a victim's photograph

should not been worn in a courtroom." App. 17a. "[T]he state court's additional comment that the buttons did not 'brand[] defendant "with an unmistakable mark of guilt"' is most reasonably understood as an explanation that the buttons were not 'so inherently prejudicial as to pose an unacceptable threat to [the] right to a fair trial.'" App. 18a (quoting *Holbrook v. Flynn*, 475 U.S. at 572).[3] The Ninth Circuit's unreasonable and selective interpretation of the state court's opinion this Court's intervention.

C. The Ninth Circuit Found That an Inherently Prejudicial Courtroom Practice Constitutes Structural Error, Contrary to this Court's Jurisprudence

1. *Deck v. Missouri*, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005) explained that the employment of an "inherently prejudicial" courtroom practice, in that case shackling, may relieve the defendant from proving *actual* prejudice to establish a due process violation. 125 S. Ct. at 2015. The Court did not, however, suggest such errors were structural, but instead expressly stated that they were subject to review for

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3. The Ninth Circuit dismissed the "branding" language as a mere "descriptive comment" from *Flynn*, but then was compelled to admit that it had, itself, employed *Flynn*'s "branding" language as an "alternative" to the "impermissible factor" test. App. 11a & n.2; *see Williams v. Woodford*, 384 F.3d 567, 588 (9th Cir. 2004). The Ninth Circuit seemingly views *Flynn*'s "branding" language as an alternative test when used by the Ninth Circuit, but an additional test when used by the California court. App. 11a & n.2. Federal courts have freely used *Flynn*'s "branding" language in this context. *See, e.g., Hill v. Ozmint*, 339 F.3d 187, 200 & n. 15 (4th Cir. 2003); *United States v. Olvera*, 30 F.3d 1195, 1197 (9th Cir. 1994); *Morgan v. Aispuro*, 946 F.2d 1462 (9th Cir. 1991); *United States v. Milner*, 962 F.2d 908, 915 (9th Cir. 1992); *see also Coy v. Iowa*, 487 U.S. 1012, 1034-35 (1988) (Blackmun, J., dissenting); *cf. United States v. Harris*, 703 F.2d 508, 512 (11th Cir. 1983) ("prison garb . . . clothes him with an unmistakable mark of guilt").

harmlessness. *Id.* at 2015-16 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)); *see also Estelle v. Williams*, 425 U.S. at 506-08 (suggesting inherently prejudicial courtroom practice subject to review for harmlessness, and citing circuit courts in accord). In the context of § 2254(d)(1) review, even if a federal court finds an unreasonable application of Supreme Court authority, it still must determine whether the constitutional error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also* App. 30a ("Under *Flynn* . . . it is possible to have a situation that is 'inherently prejudicial' but not '*so* inherently prejudicial as to pose an unacceptable threat to [a] defendant's right to a fair trial.'" (original emphasis)).

2. As Judge Bea observes in dissent, the Ninth Circuit erroneously treated the alleged error below as structural. App. 29a. The court stated that under *Estelle* and *Flynn*, a finding of inherent prejudice ends the inquiry and "requires reversal"; it never addressed harmlessness. App. 10a. The court seemingly conflates the principle that the inherent prejudice of a given courtroom practice establishes constitutional error, with the proposition that the inherent prejudice of that practice perforce establishes structural error. But whatever its misunderstanding, the Ninth Circuit's judgment is contrary to *Deck v. Missouri*, 125 S. Ct. 2015-16 and fails to demonstrate compliance with *Brecht v. Abrahamson*, 507 U.S. at 638.

Certiorari should be granted to correct the Ninth Circuit's decision that inherently prejudicial courtroom practices constitute structural error. Its holding, coupled with its announcement that it will rely on its own case authority to grant relief under § 2254(d)(1), are errors profoundly disturbing to the judicial processes of the States, particularly given the wide variety of courtroom practices, *e.g.*, shackling, jail clothing, and spectator conduct, that may be subject to review under the standard enunciated by the federal circuit court.

CONCLUSION

The petition for writ of certiorari should be granted

Dated: December 15, 2005

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATHEW MUSLADIN, *Petitioner-Appellant,*	)	**No. 03-16653**
	)	**D. C. No.**
v.	)	**CV-00-01998-JL**
ANTHONY LAMARQUE, WARDEN, *Respondent-Appellee.*	)	**ORDER AND OPINION**

Appeal from the United States District Court
for the Northern District of California
James Larson, Magistrate, Presiding

Argued and Submitted
November 2, 2004—San Francisco, California

Filed October 21, 2005

Before: Stephen Reinhardt, David R. Thompson, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Thompson

COUNSEL

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Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Glenn R. Pruden, Deputy Attorney General, and Gregory A. Ott, Deputy Attorney General, San Francisco, California, for the respondent-appellee.

ORDER

The opinion and dissent filed on April 8, 2005, slip op. 4055, and appearing at 403 F.3d 1072 (9th Cir. 2005), is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit. The clerk shall file the attached opinion and dissent in its place.

OPINION

REINHARDT, Circuit Judge:

At a murder trial in which the central question is whether the defendant acted in self-defense, are a defendant's constitutional rights violated when spectators are permitted to wear buttons depicting the deceased individual? We conclude that under clearly established Supreme Court law such a practice interferes with the right to a fair trial by an impartial jury free from outside influences.

Mathew Musladin appeals the district court's denial of his petition for a writ of habeas corpus. He contends that the buttons worn by the deceased individual's family members at his trial created an unreasonable risk of impermissible factors coming into play, and that the state court was objectively unreasonable in denying this claim both on direct appeal and in the post-conviction proceedings. In light of clearly established federal law set forth by the Supreme Court, and persuasive

authority from this court concerning the proper application of that law, we hold that the last-reasoned decision of the state court constituted an unreasonable application of Supreme Court law. Accordingly, we reverse the district court's denial of Musladin's petition and remand for issuance of the writ.

I. Factual Background and Procedural History

Musladin was charged in a California state court with first degree murder for the killing of Tom Studer, the fiancé of his estranged wife Pamela. On May 13, 1994, Musladin came to the house where Pamela, Studer, and Pamela's brother Michael Albaugh lived in order to pick up his son for a scheduled weekend visit. Pamela testified that she and Musladin had an argument, and that Musladin pushed her to the ground. According to Pamela, when Studer and Albaugh came out of the house to assist her, Musladin reached into his car to grab a gun and fired two shots at Studer, killing him. Musladin contends, however, that after Pamela fell to the ground, Studer and Albaugh appeared, holding a gun and a machete respectively, and threatened him. Musladin asserted that, after seeing the weapons, he shot in the general direction of Studer out of fear for his own life. Accordingly, at trial Musladin argued perfect and imperfect self-defense. There is no dispute that Musladin fired the shot that killed Studer, although experts for both sides agree that the fatal shot was the result of a ricochet rather than a direct hit. Under Musladin's theory of defense, there was no crime and, thus, no victim.

During the 14-day trial, Studer's family sat in the front row of the gallery. On each of those 14 days, at least three members of the family wore buttons on their shirts with the deceased's photograph on them. According to declarations submitted by the defendant, the buttons were several inches in diameter and "very noticeable." Furthermore, the family members were seated in the row directly behind the prosecution and in clear

view of the jury. Before opening statements, counsel for Musladin requested that the trial judge instruct the family members to refrain from wearing the buttons in court, out of fear that the button's expressive content would influence the jury and prejudice Musladin's defense. The trial judge denied the request. Musladin was convicted of first degree murder and three other related offenses.

Musladin exhausted the available state procedures both on direct review and on post-conviction relief. The California Court of Appeal on direct appeal held, citing *Holbrook v. Flynn*, 475 U.S. 560, 570-71 (1986), that: "While we consider the wearing of photographs of victims in a courtroom to be an 'impermissible factor coming into play,' the practice of which should be discouraged, we do not believe the buttons in this case branded defendant 'with an unmistakable mark of guilt' in the eyes of the jurors." Musladin then filed a petition for a writ of habeas corpus in the District Court for the Northern District of California. He alleged, among other things, that the state court unreasonably applied clearly-established federal law in determining that his right to a fair trial was not violated by the family members' wearing of the buttons depicting the deceased. The district court denied the petition and this appeal followed.

II. The AEDPA Standard

Musladin's petition for habeas corpus is governed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Therefore, we may not grant habeas relief to the defendant unless the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Because state courts often issue "postcard" denials that offer no rationale for their dispositions, we determine whether the state court unreasonably applied federal law by looking to the "last reasoned decision of the state

court as the basis of the state court's judgment." *Franklin v. Johnson*, 290 F.3d 1223, 1233 n.3 (9th Cir. 2002). In this case, we look to the opinion of the California Court of Appeal on direct appeal.

AEDPA limits the source of clearly-established federal law to Supreme Court cases. *See* 28 U.S.C. § 2254(d)(1). Nevertheless, we recognize that precedent from this court, or any other federal circuit court, has persuasive value in our effort to determine "whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and . . . what law is 'clearly established.'" *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000); *see also Robinson v. Ignacio*, 360 F.3d 1044, 1057 (9th Cir. 2004) ("When faced with a novel situation we may turn to our own precedent, as well as the decisions of other federal courts, in order to determine whether the state decision violates the general principles enunciated by the Supreme Court and is thus contrary to clearly established federal law."); *Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003) ("[T]he objective reasonableness of a state court's application of Supreme Court precedent may be established by showing other circuits having similarly applied the precedent."); *Ouber v. Guarino*, 293 F.3d 19, 26 (1st Cir. 2002) ("[T]o the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue." (internal quotation marks and citation omitted)); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 890 (3d Cir. 1999) ("[W]e do not believe federal habeas courts are precluded from considering the decisions of the inferior federal courts when evaluating whether the state court's application of the law was reasonable.") (en banc).

III. Discussion

[1] "Due process requires that the accused receive a fair trial

by an impartial jury free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). The Supreme Court has held that when the consequence of a courtroom practice is that an "unacceptable risk is presented of impermissible factors coming into play," there is "inherent prejudice" to a defendant's constitutional right to a fair trial and reversal is required. *Flynn*, 475 U.S. at 570. In order to determine whether Musladin is entitled to federal habeas relief, we must therefore assess whether the buttons depicting the deceased individual worn by spectators at the trial posed a risk of impermissible factors coming into play that is similar to those previously found to exist in other circumstances, such as in compelling a criminal defendant to wear prison garb and shackles before the jury, *see Estelle v. Williams*, 425 U.S. 501 (1976), and in permitting spectators at a rape trial to wear anti-rape buttons, *see Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990). Because we conclude that no significant difference exists between the circumstances of this case and the "unacceptable risks" found to exist in *Williams* and *Norris*, we hold that the state court unreasonably applied established Supreme Court law in denying Musladin relief.

a. Clearly Established Federal Law

The underlying federal law in this case — that certain practices attendant to the conduct of a trial can create such an "unacceptable risk of impermissible factors coming into play," as to be "inherently prejudicial" to a criminal defendant — was clearly established by the Supreme Court in *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986). In *Williams*, the Court considered whether compelling a criminal defendant to appear at his jury trial dressed in prison clothing violated his right to a fair trial. *See Williams*, 425 U.S. at 503-06. The Court found that the compelled wearing of prison clothing constitutes a continuous impermissible reminder to the jury of the defendant's condition: an accused in custody who is unable to post bail. *Id.* at 505. The Court held that the

influence of prison clothing, and the message it conveys to the jurors, impairs a defendant's presumption of innocence. *See id.* at 503. Noting these and other concerns, the Court concluded that because "[t]he defendant's clothing is so likely to be a continuing influence throughout the trial . . . an unacceptable risk is presented of impermissible factors coming into play." *Id.* at 505.

In *Flynn*, the court reaffirmed its holding in *Williams* regarding the "inherent prejudice" of courtroom practices that create an "unacceptable risk of impermissible factors coming into play," but distinguished the case before it on the facts. The defendants in *Flynn* argued that the presence of four uniformed state troopers sitting in the front row directly behind them at trial led the jury to draw adverse inferences about them. *Flynn*, 475 U.S. at 563-64. The Court explained that there are certain "courtroom practices [that it] might find inherently prejudicial," but that the use of security officers to the extent involved did not fall into that category. *Id.* at 569. As the Court explained, the "inferences that a juror might reasonably draw from the officers' presence" in that case "need not be . . . that [the defendant] is particularly dangerous or culpable." *Id.* In distinguishing *Flynn* from *Williams*, the Court pointed out that the jury may not even have noticed that extra guards were being used in the trial, or most likely, drew no impermissible inference from their presence. The court stated, "[guards] are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm." *Id.* at 569. The law concerning the "inherently prejudicial" nature of courtroom practices which convey an impermissible message, however, remained unchanged and clear.

[2] This court's decision in *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), has persuasive value in an assessment of the meaning of the federal law that was clearly-established by *Williams* and *Flynn* and whether the state court's application of

that law in the case before us is objectively unreasonable. Like the present case, *Norris* involved the application of the Supreme Court's "inherent prejudice" rule in assessing whether buttons worn by audience members during a trial created an "unacceptable risk of impermissible factor coming into play." *See Norris*, 918 F.2d at 831-32. In *Norris*, the defendant was facing a criminal charge of rape. During the trial, several women sat in the spectator's gallery wearing buttons that read "Women Against Rape." *Id.* at 829. We noted that at any given time in Norris's trial, approximately three women in the audience would be wearing the anti-rape buttons. *Id.* at 831. Faced with these facts, we applied *Williams* and concluded that "[j]ust as the compelled wearing of prison garb during trial can create an impermissible influence on the jury, throughout trial the buttons' message . . . constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence." *Id.* at 831. As we explained, because of the button's obvious communicative purpose, its impermissible message was far more clear and direct than that deemed unlawful in *Williams*:

> Thus, though far more subtle than a direct accusation, the buttons' message was all the more dangerous precisely because it was not a formal accusation. Unlike the state's direct evidence, which could have been refuted by any manner of contrary testimony to be judged ultimately on the basis of each declarant's credibility, the buttons' informal accusation was not susceptible to traditional methods of refutation. Instead, the accusation stood unchallenged, lending credibility and weight to the state's case without being subject to the constitutional protections to which such evidence is ordinarily subjected.

Id. at 833.

Our reliance on *Norris* is appropriate for another reason: the

last reasoned state court opinion identified *Norris* as setting forth the operative law as announced by the Supreme Court, and the state court sought to apply *Norris* when reaching its determination. Indeed, the state court's unreasonable application of federal law lies in its misapplication of the *Williams* test, as it was explained in *Norris*, to the facts of this case.

The state court's decision to apply *Norris*, and ours to afford it persuasive weight when determining the federal law as established by *Williams*, are particularly significant in light of the striking factual similarities between *Norris* and the present case. *See Richardson v. Bowersox*, 188 F.3d 973, 978 (8th Cir. 1999) ("In determining whether a state court's decision involved an unreasonable application of clearly established federal law, it is appropriate to refer to decisions of the inferior federal courts in factually similar cases.").

b. Unreasonable Application of The Law

Although the state court identified the correct federal law to apply in adjudicating Musladin's claim, citing *Williams* for the controlling principle, and properly looking to our decision in *Norris* as a persuasive application of that federal law in a factually similar case, the state court was objectively unreasonable both in its ultimate conclusion and in the rationale it employed in denying Musladin's appeal. The California Court of Appeal justified its rejection of Musladin's claim as follows:

> [i]n contrast to the buttons in *Norris*, the message to be conveyed by the Studer family wearing buttons is less than clear. The simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member. While we consider the wearing of photographs of victims

> in a courtroom to be an "impermissible factor coming into play," the practice of which should be discouraged, we do not believe the buttons in this case branded defendant "with an unmistakable mark of guilt" in the eyes of the jurors.

People v. Musladin, No. H015159 at 21-22 (Cal. Ct. App. Dec. 9, 1997) (unpublished decision) (citing *Flynn*, 475 U.S. at 570-71).

[3] By disposing of Musladin's claim in the above manner, the state court unreasonably applied federal law by imposing an additional and unduly burdensome requirement — demanding that the challenged practice cause the "brand[ing]" of the defendant with an "unmistakable mark of guilty" — even though the *Williams* test for finding "inherent prejudice" had already been met. The court specifically found "the wearing of photographs of victims in a courtroom *to be* an 'impermissible factor coming into play'" (emphasis added). Under Williams and Flynn, that finding, in itself establishes "inherent prejudice" and requires reversal.

Williams and *Flynn* cannot be distinguished. In the case before us, the state court found not only that an "unreasonable risk" existed that an impermissible factor *would* come into play, but that an impermissible factor actually *had* come into play. Nevertheless, after setting forth this finding, the state court added that, although the practice of wearing such buttons "should be discouraged," Musladin was not entitled to relief because "the buttons in this case [did not] brand[ ] defendant 'with an unmistakable mark of guilt' in the eyes of the jurors." The state court was unreasonable in imposing this additional requirement after it had concluded that the "inherent prejudice" elements had already been fully established.

The Supreme Court announced in *Williams* and *Flynn* that following a finding of an unacceptable risk of impermissible

factors coming into play, no further showing is necessary because the practice is then deemed "inherently prejudicial." Here, the state court flouted that rule: it required that the challenged practice not only constitute an unacceptable risk of an impermissible factor coming into play but also that it "brand" the defendant with an "unmistakable mark of guilt." This additional test imposes too high and too unreasonable a burden on defendants and is contrary to established Supreme Court law. *See Benn v. Lambert*, 283 F.3d 1040, 1051 n.5 (9th Cir. 2002).[1]

[4] We note that the "branding" with an "unmistakable mark of guilt" language employed in *Flynn* constituted only a descriptive comment. *See Flynn*, 475 U.S. at 571 (quoting *Williams*, 425 U.S. at 518 (Brennan, J., dissenting)).[2] Both

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[1]This is not to say that a showing of actual prejudice has no role in a *Flynn* challenge. As we held in *Norris*, reversal is required if a defendant can prove *either* actual *or* inherent prejudice. *See Norris*, 918 F.2d at 828; *accord Woods*, 923 F.2d at 1457; *see also United States v. Halliburton*, 870 F.2d 557, 560 (9th Cir. 1989) ("If we find that the jurors' brief view of Halliburton in handcuffs was not inherently prejudicial, we must then determine whether appellant has carried his burden of affirmatively showing actual prejudice.").

[2]Justice Brennan's dissent in *Williams* was the first time a member of the Court employed the "branding" language. Justice Brennan explained that regardless of whether prison clothing was compelled or not, the wearing of those clothes adversely affects a defendant's presumption of innocence, because, among other things, the clothing "surely *tends* to brand him in the eyes of the jury with an unmistakable mark of guilt." *Williams*, 425 U.S. at 518 (Brennan, J., dissenting) (emphasis added). When it was repeated in *Flynn*, the majority had already dismissed the defendant's challenge, and was simply noting in the alternative that "[e]ven had the jurors been aware that the deployment of troopers was not common practice in Rhode Island, we cannot believe that the use of the four troopers tended to brand respondent in their eyes 'with an unmistakable mark of guilt.'" *Flynn*, 475 U.S. at 571 (quoting *Williams*, 425 U.S. at 518 (Brennan, J., dissenting)). *Flynn* never stated that in order to prevail the defendant was required to meet that standard. Rather, it may simply have been refuting the defendant's contention that the challenged practice had the described effect.

Williams and *Flynn* are clear as to the legal standard, and neither suggested that "branding" was necessary. Indeed, under the state court's interpretation, the holding in *Williams* would not survive its own test. The *Williams* Court never found, or even implied, that the compelled donning of prison clothing would "brand[the] defendant 'with an unmistakable mark of guilt' in the eyes of the jurors." Rather, the court's concern was directed purely at the clothes' role as a "constant reminder of the accused's condition" — a "continuing influence throughout the trial," principally because the requirement that defendants wear prison clothes "operates usually against only those who cannot post bail prior to trial." *Williams*, 425 U.S. at 504-06. At most, the *Williams* Court found that the shackling and prison clothes were "unmistakable indications of the need to separate a defendant from the community at large," not that they would "brand" the defendant with an "unmistakable mark of guilt." *Flynn*, 475 U.S. at 569, 571. Although a practice that brands a defendant as guilty would surely be sufficient to demonstrate "inherent prejudice" and require reversal, branding is not a necessary element of establishing such prejudice. The state court's imposition of the additional "branding" requirement was contrary to clearly established federal law and constituted an unreasonable application of that law.[3]

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[3]We have consistently granted relief in this circuit on *William-Flynn* grounds without requiring the defendant to show that the challenged practice "branded" him with "an unmistakable mark of guilt." *See, e.g., Norris*, 918 F.2d at 831; *United States v. Olvera*, 30 F.3d 1195, 1198 (9th Cir. 1994) ("We conclude that [the challenged practice] posed an unacceptably high risk of influencing the jury's judgment in a manner that undermined the presumption of innocence."). Although we have found that proving a mark of unmistakable guilt is *sufficient* to establish prejudice, we have never held that it is *necessary*. To the contrary, we have noted that it may serve an alternative to the basic test, which remains the traditional standard by which we determine the existence of inherent prejudice. *See Williams v. Woodford*, 384 F.3d 567, 588 (9th Cir 2004) ("The Supreme Court has said that security measures at trial are inherently prejudicial when they 'tend[ ] to brand [the defendant] in [the jurors'] eyes with an unmistakable mark of guilt,' *or* when

[5] Moreover, the finding by the California Court of Appeal goes beyond the finding that was held to require reversal in *Norris*. The state court attempted to distinguish *Norris*, but *Norris* simply cannot reasonably be distinguished. The message conveyed in the present case is even stronger and more prejudicial than the one conveyed in *Norris*. The state court unreasonably justified its conclusion by stating that, when compared to the buttons worn by spectators in *Norris*, the "message conveyed by the Studer family wearing buttons is less than clear." This is simply not the case. Just as we held that the message sent by the anti-rape buttons was substantially more direct and clear than the message conveyed by the prison clothing in *Williams*, *see Norris*, 918 F.2d at 831, the message conveyed by the buttons depicting Studer in the case before us is substantially more direct and clear than that of the anti-rape buttons in *Norris*. In *Norris*, the buttons expressed the wearer's position against rape but did not specify the defendant or the victim. In this case, the buttons actually depicted the individual that the defendant was charged with murdering and represented him as the innocent party, or the victim. Here, the direct link between the buttons, the spectators wearing the buttons, the defendant, and the crime that the defendant allegedly committed was clear and unmistakable. The primary issue at Musladin's trial was whether it was the defendant or the deceased individual who was the aggressor. The buttons essentially "argue" that Studer was the innocent party and that the defendant was necessarily guilty; that the defendant, not Studer, was the initiator of the attack, and, thus, the perpetrator of a criminal act.

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they create 'an unacceptable risk . . . of impermissible factors coming into play.'" (emphasis added) (internal citations omitted)). Thus, branding may be an alternative means of establishing a violation, but it is not an additional requirement to be imposed after the violation has already been established under the traditional *Williams-Flynn* standard.

[6] The California court's belief that buttons depicting the deceased individual were "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member" is even more incorrect as a matter of law than the view that interpreting the "Woman against Rape" buttons in *Norris* served no purpose other than women announcing a general statement against rape or expressing solidarity with, or support for, the rape victim in Norris's case.[4] We did not excuse the wearing of the buttons on that ground in *Norris*, and it was objectively unreasonable in light of *Norris* for the state court to do so here. *See Norris*, 918 F.2d at 831. In both *Norris* and the case before us, the law requires the courts to look beyond the general sentiment a button reflects and to determine the specific message that the button conveys in light of the particular facts and issues before the jury. Doing so here, a reasonable jurist would be compelled to conclude that the buttons worn by Studer's family members conveyed the message that the defendant was guilty, just as the buttons worn by spectators in *Norris* did in that case.

IV. Conclusion

[7] In finding the wearing of buttons depicting the deceased

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[4]Even if we concluded that a showing of solidarity was the primary effect of the buttons in *Norris* or the buttons worn by the deceased individual's family in this case, such a showing would not be inconsistent with the conveying of a message about the defendant or his guilt. The Eleventh Circuit considered a similar question when a defendant, accused of killing a prison guard, challenged the presence of uniformed officers in the audience at his trial. In a post-*Flynn* decision, the Eleventh Circuit held that the officers' act of showing solidarity was inherently prejudicial to the defendant and granted the writ: "The officers in this case were there for one reason: they hoped to show solidarity with the killed correctional officer. In part, it appears that they wanted to communicate a message to the jury . . . [that they] wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message." *Woods v. Dugger*, 923 F.2d 1454, 1459-60 (11th Cir. 1991).

individual to be an "impermissible factor coming into play," the state court reached the point at which the Supreme Court "went no further and concluded that the practice [at issue wa]s unconstitutional." *Flynn*, 475 U.S. at 568. Instead of granting relief, however, the state court, disregarding the fact that the central question was one of self-defense, unreasonably stated that the message conveyed through the wearing of the buttons in this case was not as clear as that conveyed by the anti-rape buttons in *Norris*. The state court then unreasonably held that "branding" the defendant with "an unmistakable mark of guilt" is necessary to grant relief even though it had already found that "impermissible factors" had come into play before the jury. The state court did not simply engage in an incorrect application of Supreme Court law. Rather, its application of that law was contrary to the Court's established rule of law and was objectively unreasonable. Accordingly, we reverse the district court's denial of Musladin's petition for habeas corpus and remand for issuance of the writ. Musladin shall be released unless the state elects to re-try him within 90 days of the issuance of the mandate.

Reversed and Remanded.

THOMPSON, Senior Circuit Judge, dissenting:

I respectfully dissent.

A further statement of the facts seems appropriate. The petitioner, Musladin, and his wife, Pam, were married but separated at the time of the crimes of which Musladin was convicted. Pam was living at her mother's house with her brother Michael Albaugh, her fiancé Tom Studer, and Garrick Musladin, her then three-year-old son by Musladin. On the day of the shooting, Musladin went to the house to pick up Garrick for a scheduled weekend visitation.

The prosecutor presented evidence that an argument ensued between Pam and Musladin in the driveway, during which Musladin pushed Pam to the ground and reached for a gun in his car. Albaugh, standing in the driveway, yelled, "He's got a gun." Pam and Studer ran up the driveway. Musladin fired the gun at Pam and Studer, hitting Studer in the back of the shoulder. Pam ran into the house and out the back door. Studer fell to the ground and attempted to crawl underneath a truck in the garage. Musladin entered the garage and fired a second shot which ricocheted into Studer's head, killing him.

Musladin presented a different version of these events. He admitted shooting at Studer and killing him, but claimed perfect and imperfect self-defense. He testified that he believed Albaugh was carrying a machete and Studer a gun, and that he fired both shots out of fear for his life. After firing the shots, he got in his car and drove away.

Musladin was tried and convicted of first-degree murder of Studer and attempted murder of Pam.

I disagree with the majority's reliance upon our decision in *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), for the application in this case of the rule of *Estelle v. Williams*, 452 U.S. 501 (1976). In *Williams*, the Court determined it to have been a violation of the right to a fair trial for the state to have compelled the defendant to wear prison clothing during his trial. *Id.* at 505. The Court held the prison clothing impaired the defendant's presumption of innocence. *Id.* In the present case, the state court permitted relatives of the deceased victim to wear buttons in the courtroom. The buttons disclosed only the deceased victim's picture, nothing else, and had nothing to do with the defendant.

Our *Norris* case was a case involving three women who wore

buttons in the courtroom during the defendant's trial for rape, but that case is not controlling here. The buttons in *Norris* were two and one-half inches in diameter and bore the words "Women Against Rape." *Norris*, 918 F.2d at 830. "[T]he word 'rape' [was] underlined with a broad red stroke." *Id.* We stated: "[T]he buttons' message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence." *Id.* at 831.

Here, the buttons were three to four inches in diameter and, except for the deceased victim's picture, there was nothing else on them. The buttons conveyed no "message." As the state appellate court stated, "The simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member."

Further, it is difficult to distinguish this case from the routine situation of a deceased victim's family members, without buttons, sitting as a group in a courtroom during a trial. Jurors in such a trial surely would recognize the group for what it is. The addition of buttons worn by them showing only the victim's photograph would add little if anything to any possible risk of impermissibly prejudicing the jury.

Although the state appellate court in the present case commented that it "consider[ed] the wearing of the photographs of victims in a courtroom to be an 'impermissible factor coming into play,' the practice of which should be discouraged," quoting the "impermissible factor" language from *Williams*, 425 U.S. at 505 (which the Supreme Court also quoted in *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)), the state court's "impermissible factor" comment is most reasonably understood as reflecting that court's view that buttons bearing a victim's photograph should not be worn in a courtroom. The comment

did not change the buttons or make them something they were not. Moreover, the state court's additional comment that the buttons did not "brand[ ] defendant 'with an unmistakable mark of guilt'" is most reasonably understood as an explanation that the buttons were not "so inherently prejudicial as to pose an unacceptable threat to [the] right to a fair trial." *Holbrook*, 475 U.S. at 572.

In sum, I do not believe the decision by the California Court of Appeal was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254(d)(1). The state court's decision was not "contrary to" any such federal law, because the state court did not "'appl[y] a rule that contradicts the governing law set forth in [Supreme Court] cases,'" nor did the state court "'confront[ ] a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrive[ ] at a result different from [Supreme Court] precedent.'" *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

Nor does the state court's decision abridge the "unreasonable application" clause of 28 U.S.C. § 2254(d)(1). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Lockyer*, 538 U.S. at 75 (internal citations omitted). Here, even if erroneous (which it was not), the California Court of Appeal's decision was not "objectively unreasonable."

The petitioner also asserts a number of other claims that he argues merit habeas relief. I would reject those claims as well, and thus would affirm the district court.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATHEW MUSLADIN,	)	**No. 03-16653**
Petitioner-Appellant,	)	**D.C. No.**
	)	**CV-00-01998-JL**
v.	)	**Northern District**
	)	**of California,**
ANTHONY LAMARQUE, WARDEN,	)	**San Francisco**
Respondent-Appellee.	)	**ORDER**
	)	

Filed October 21, 2005

Before: Stephen Reinhardt, David R. Thompson, and Marsha S. Berzon, Circuit Judges.

Order;
Dissent by Judge Kleinfeld;
Dissent by Judge Bea

ORDER

The petition for panel rehearing is DENIED.

The full court was advised of the suggestion for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35. The request for rehearing en banc is DENIED.

KLEINFELD, Circuit Judge, with whom KOZINSKI, O'SCANNLAIN, TALLMAN, BYBEE, CALLAHAN, and BEA, Circuit Judges, join, dissenting from denial of rehearing en banc:

I respectfully dissent from the order denying rehearing en banc. We have effectively erased a statutory provision designed to restrict the power of the lower federal courts to overturn fully reviewed state court criminal convictions. And we have sharpened a serious circuit split.

Musladin was convicted of murder, and his conviction was upheld through direct and collateral review in the California courts. The California Court of Appeal carefully and reasonably applied the relevant precedents of the United States Supreme Court, but arguably deviated from the implications of a Ninth Circuit precedent.

In 1996, Congress adopted the Antiterrorism and Effective Death Penalty Act (AEDPA), amending the standard that federal courts must apply to state criminal convictions in habeas cases. The statute as amended says that we may grant a habeas petition if and only if the last reasoned state court decision "was contrary to, or involved an unreasonable application of, **clearly established** Federal law, **as determined by the Supreme Court of the United States**."[1] Our decision in this case has the practical effect of erasing the statutory phrase "as determined by the Supreme Court of the United States." Our tools for statutory construction are many,[2] but they do not include an eraser. Yet here we go, erasing the "clearly established" phrase and

[1]28 U.S.C. § 2254(d)(1) (emphasis added).

[2]*See* 2A Norman J. Singer, Sutherland on Statutes and Statutory Construction Part V, subpart A (6th ed. 2000).

expanding the "as determined" phrase. The statute in nine states now says, as a practical matter, "contrary to, or involved an unreasonable application of, ~~clearly established~~ Federal law, as determined by the Supreme Court of the United States, **giving 'persuasive weight' to Ninth Circuit decisions that have applied Supreme Court decisions.**" We do not have that legislative authority.

The facts of this case and of the controlling precedents show just how clear our mistake is. Musladin, embroiled in a custody dispute with his estranged wife, murdered her new fiancé. At his trial, three members of the fiancé's family sat in the spectator section of the courtroom wearing buttons with his picture on them. The buttons were two-to-four inch pictures of the victim but had no words. Musladin argued in his state court appeal and petition for review that the buttons denied him due process of law by eroding his presumption of innocence.

The California Court of Appeal concluded that the buttons contained no express message and were unlikely to signify "anything other than the normal grief occasioned by the loss of a family member."[3] The California Court carefully examined *Estelle v. Williams*[4] and *Holbrook v. Flynn*[5] (the relevant Supreme Court decisions on) and Ninth Circuit cases. Though the Court of Appeal noted that button wearing should be "discouraged," it held that the buttons did not amount to a denial of due process because they did not brand Musladin "with an unmistakable mark of guilt."[6]

The statute is quite clear that our task on review of Musladin's petition for a writ of habeas corpus is not to

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[3]*People v. Musladin*, No. H015159 at 21 (Cal. Ct. App. 1997).

[4]*Estelle v. Williams*, 425 U.S. 501 (1976).

[5]*Holbrook v. Flynn*, 475 U.S. 560 (1986).

[6]*People v. Musladin*, No. H015159 at 22.

examine the California Court of Appeal decision as though we were a higher California court. Rather, we exercise a much more limited and deferential review to determine whether the California Court of Appeal acted contrary to "clearly established . . . Supreme Court" precedent or "unreasonabl[y]" applied it.[7] The only question for us is whether there is any Supreme Court authority that holds that silent signals of affiliation by spectators in a courtroom deny a defendant due process by eroding his presumption of innocence. The answer is that there is no such case. That should be the end of our inquiry.

The Supreme Court held in *Estelle v. Williams* that forcing a defendant to wear prison clothes at trial is "inherently prejudicial" and denies due process.[8] It held in *Holbrook v. Flynn* that the presence of several armed uniformed officers in the spectators' row directly behind the prisoner is not inherently prejudicial.[9] Neither of these cases holds that a spectator's symbol of affiliation or even opinion denies due process to a defendant.

Dressing the defendant in "prison garb," the *Estelle* problem,[10] is not analogous to spectators wearing buttons. First, prison garb is an unambiguous statement that the defendant is already a prisoner. Second, it is a communication to the jury of the government's determination—not a non-governmental spectator's—that the defendant belongs in jail. The buttons, by contrast, are ambiguous. They may mean "we really want this defendant punished because we care a lot about his victim," or they may merely mean "we care a lot about the victim," without an implication that the defendant is the proper person to be

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[7] 28 U.S.C. § 2254(d)(1).

[8] *Estelle*, 425 U.S. at 530 n.10.

[9] *Flynn*, 475 U.S. at 568-69.

[10] *Estelle*, 425 U.S. at 503.

punished. Even more important, the spectators' buttons do not imply any determination by the government. Even if the buttons did imply that the spectators wanted the defendant punished, that would not be as corrosive of the presumption of innocence as the government saying "this defendant belongs in jail and he is already there because of our determination." Unlike the spectators' buttons in this case, the prison garb in *Estelle* detracted from the presumption of innocence and from the defendant's dignity in the courtroom.[11]

The presence of the armed officers in the spectator section in *Flynn* more closely resembles the facts in our case than does the prison garb in *Estelle*. Both involve what the jury might perceive as communications from the spectators' section. But the Supreme Court held that the presence of the armed officers did *not* deprive the defendant of due process by corroding the presumption of innocence. And the armed officers were far more likely to do so than spectators not associated with the government because the officers represented the government and might have communicated its judgment that the defendant was dangerous. The Supreme Court held that the armed officers did *not* deny due process because of the "wider range of inferences that a juror might reasonably draw from the officers' presence."[12] The courtroom cannot be totally free of indications that the state thinks the defendant is guilty, for "jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance."[13] With these two Supreme Court cases as bookends—showing what denies due process and

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[11] *See id.* at 518 (Brennan, J., dissenting) ("Identifiable prison garb robs an accused of the respect and dignity accorded other participants in a trial and constitutionally due the accused as an element of the presumption of innocence, and surely tends to brand him in the eyes of the jurors with an unmistakable mark of guilt.").

[12] *Flynn*, 475 U.S. at 569.

[13] *Id.* at 567.

what does not—the California courts were well within the bounds of reasonable interpretation in determining that this case is more like *Flynn*. The buttons with a picture of the dead fiancé did not say or obviously imply that the defendant killed him, just that the spectators wearing them cared about him.

So how did the panel majority manage to reach a different result in the face of Supreme Court decisions plainly leaving room for the California courts' conclusion and a statute limiting us to Supreme Court decisions? The panel extended a *Ninth Circuit* case, not a *Supreme Court* case, *Norris v. Risley*.[14] But the statute says we cannot do that, with the express restriction "**as determined by the Supreme Court of the United States**."[15] The panel evades that restriction by holding that we give "persuasive weight" to Ninth Circuit cases when determining what is "clearly established Federal law, as determined by the Supreme Court." The panel's proposition means that we will grant writs based on precedents *other than* those of the Supreme Court. Ergo, the statutory restriction on our power is erased.

We held in *Norris*—before AEDPA—that the writ should be granted where several female spectators wore "Women Against Rape" buttons in the presence of jurors in "elevators, in the courtroom, on their way to and from the courtroom," and while "the women served refreshments outside the courtroom on behalf of the state."[16] California could properly decide the case at bar by distinguishing *Norris*, disagreeing with *Norris*, or in complete ignorance of *Norris*. Under AEDPA's restriction to Supreme Court decisions, we are obligated to deny the writ so long as the California decision was not contrary to or an unreasonable application of *Estelle* and *Flynn*. We cannot

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[14]*Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990).

[15]28 U.S.C. § 2254(d)(1) (emphasis added).

[16]*Norris*, 918 F.2d at 829.

legitimately require the California courts to follow Ninth Circuit decisions on pain of our letting their prisoners out onto the street.

At least four of our sister circuits have expressly repudiated the error our panel has made. The Sixth Circuit, in *Mitzel v. Tate*, held that "[w]e may not look to the decisions of our circuit, or other courts of appeals, when 'deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law.'"[17] The Tenth Circuit in *Welch v. City of Pratt* held AEDPA "restricts the source of clearly established law to [the Supreme] Court's jurisprudence" and federal courts are therefore "no longer permitted to apply our own jurisprudence."[18] The Seventh Circuit likewise determined that "[f]ederal courts are no longer permitted to apply their own jurisprudence, but must look exclusively to Supreme Court case-law."[19]

The Fourth Circuit has also held that habeas relief may be granted only if "the state court decision is contrary to, or an unreasonable application of Supreme Court jurisprudence, and not circuit court precedent," so "any independent opinions we offer on the merits of the constitutional claims will have no determinative effect in the case before us, nor any precedential effect for state courts in future cases. At best, it constitutes a body of constitutional dicta."[20] The Fourth Circuit expressly rejects the notion that the lower federal courts need to provide "guidance" to the state courts on how to read the Supreme Court opinions. There is

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[17]*Mitzel v. Tate*, 267 F.3d 524, 531 (6th Cir. 2001) (quoting *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998)).

[18]*Welch v. City of Pratt, Kansas*, 214 F.3d 1219, 1222 (10th Cir. 2000) (internal citations and quotations omitted).

[19]*Bocian v. Godinez*, 101 F.3d 465, 471 (7th Cir. 1996).

[20]*Bell v. Jarvis*, 236 F.3d 149, 162 (4th Cir. 2000) (en banc).

> no reason to presume that state courts are in need of our guidance in interpreting and applying the controlling Supreme Court precedents. Our charge under the statute is only to determine whether the state court's adjudication of the claims before it was a reasonable one in light of the controlling Supreme Court law.[21]

Arguably our panel did not create the circuit split *ex nihilo*. The panel notes that the Eighth Circuit in *Williams v. Bowersox*[22] held that the "diversity of opinion" among federal courts on a particular issue suggested that the state court did not unreasonably apply Supreme Court precedent.[23] But saying that the state court decision is *not* unreasonable because some federal courts have reached similar conclusions is not at all the same as saying that the state court decision *is* unreasonable because a circuit court has reached a contrary conclusion. The First Circuit in *Ouber v. Guarino*[24] and the Third Circuit in *Matteo v. Superintendent*[25] come much closer to supporting the panel's decision, but our panel is unique in how boldly it has flown in the face of the statutory restriction to Supreme Court decisions.

Those of us who have actually tried cases to juries have frequently observed how spectators communicate their feelings. This communication is an unavoidable consequence of the Constitutional guarantee of "public trial."[26] Sometimes there is a wall of brown or blue in the spectators' section, displaying that state or municipal police care a great deal about the case. Sometimes the courtroom is full of Hells Angels colors,

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[21] *Id.* at 162.

[22] *Williams v. Bowersox*, 340 F.3d 667 (8th Cir. 2003).

[23] *Id.* at 672.

[24] *Ouber v. Guarino*, 293 F.3d 19, 26 (1st Cir. 2002).

[25] *Matteo v. Superintendent*, 171 F.3d 877, 889-90 (3rd Cir. 1999).

[26] U.S. CONST. amend. VI.

signifying a concern for their brother in the defendant's chair. The local rape support center volunteers may crowd into the seats behind the prosecutor in a rape trial while the victim sits silently looking at the jurors through the entire trial. Defense lawyers round up family members to show support for the defendant by sitting behind the defense table.

There is nothing wrong with the jury knowing that people care about the case and the parties. Typically, the spectators arrange themselves like wedding guests choosing the bride's side or the groom's side, with those who favor a party sitting behind the lawyer for that side. In a public trial, the jury can always see that a lot of people care about one side or the other, or that no one cares except the parties and lawyers. Good lawyers often use this to their advantage, and good judges exercise prudence to avoid situations that might intimidate or prejudice the jury. Perhaps, as the California Court of Appeal implied, the trial judge in this case should have told the family members to remove their buttons. T-shirts with pictures of the victim would be difficult, but buttons are easy. There is no legitimate way for judges to prevent spectators in a public trial from showing that they care about the case and support one side or the other, even if only by where they sit and who they look at with sympathy or hostility. Public concern and public sympathy for one side or the other are part of what it means for a trial to be "public."

The panel's error is symptomatic of a deeper problem than its misapplication of Supreme Court precedent to spectators' photo buttons. Few things incumbent on powerful government officials are more fundamental than their duty to comply with the legal limitations on their power. Our panel has arrogated to our court power that we do not legitimately possess.

State judges take the same oath to uphold the Constitution that we do and perform the same work we do, construing

constitutional provisions and applying them to the facts before them. We do not sit as a state appellate court. One problem they sometimes have is deciding what to do about lower federal court decisions. Obviously they have to follow United States Supreme Court decisions, and they construe them as routinely as we do. Obviously they do not have to follow federal decisions on questions of state law.[27] Not quite as obviously, but just as true, state courts understand that they are free to act contrary to circuit court holdings on questions of federal law.[28] Lower courts must follow the law laid down by higher courts. But we are not a higher court than the Supreme Court of California or the California Court of Appeal, or for that matter, California traffic courts. We are in a different judicial hierarchy.

Our panel's error creates uncertainty and inconsistency for the nine state court systems and nearly 20% of our nation's population within the Ninth Circuit. Must they follow our decisions when they think *our* decisions are contrary to or unreasonable applications of Supreme Court precedent? The statute tells them one thing, we tell them another, and the briefs they get will tell them both. Under the plain statutory language, state courts are free to ignore our decisions. But under the panel's decision, they must follow them. We have effectively

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[27] *See generally* 20 AM. JUR. 2D Courts § 225 (1965) (noting that state courts free to ignore a federal ruling on a state law); *see also Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938) (holding that federal courts are bound by state interpretations of state law); *Collier v. Bayer*, 408 F.3d 1279, 1283 n.4 (9th Cir. 2005) ("Federal courts of appeal[s] may not review state courts' interpretations of state law.").

[28] *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997); *see also Lockhart v. Fretwell*, 506 U.S. 364, 375-76 (1993) (Thomas, J., concurring) ("In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."); *People v. Williams*, 16 Cal.4th 153, 190 (1997) (recognizing that decisions of lower federal courts interpreting federal law are not binding on state courts).

turned ourselves into the supreme court of the nine states in our circuit. I therefore dissent.

BEA, Circuit Judge, with whom Circuit Judges KOZINSKI, O'SCANNLAIN, and KLEINFELD join, dissenting from the denial of rehearing en banc:

I join Judge Kleinfeld's dissent from the denial of rehearing en banc. I write separately to underscore that it was not an "unreasonable application of clearly established federal law" for the California Court of Appeal to deny habeas relief notwithstanding its determination that the wearing of victims' photographs in a courtroom constitutes an "impermissible factor coming into play."

The panel opinion suggests that, once the California Court of Appeal "specifically found 'the wearing of photographs of victims in a courtroom *to be* an "impermissible factor coming into play,"'" Musladin's conviction could not stand. *See Musladin v. LaMarque*, ___ F.3d ___, ___ (9th Cir. 2005) (panel's emphasis). The rationale offered in support of this conclusion is that, "[u]nder *Williams* and *Flynn*," the finding of an impermissible factor coming into play "in itself establishes 'inherent prejudice' and requires reversal." *Id.* The panel opinion misconstrues *Williams* and *Flynn*. In *Williams*, the Court established that putting a defendant on trial in prison garb is constitutional error of the variety amenable to harmless-error analysis. *See Williams*, 425 U.S. at 507-09 (adopting the position of the Fifth Circuit that "the harmless-error doctrine is applicable to this line of cases"); Charles Alan Wright et al., *Federal Practice and Procedure* § 855, at 477 & n.8 (3d ed. 2004). When the Court in *Flynn* "reaffirmed its holding in *Williams*," *see Musladin*, ___ F.3d at ___, it did not, of course, transform "courtroom arrangements challenged as inherently

prejudicial" into structural errors, *Flynn*, 475 U.S. at 570. Rather, *Flynn* suggested that, to obtain a conviction's reversal, a defendant must show "actual prejudice" even after successfully demonstrating that the challenged courtroom arrangement was "inherently prejudicial." *See id.* at 572 ("[I]f the challenged practice is not found inherently prejudicial *and* if the defendant fails to show actual prejudice, the inquiry is over." (emphasis added)). Under *Flynn*, in other words, it is possible to have a situation that is "inherently prejudicial" but not "*so* inherently prejudicial as to pose an unacceptable threat to [a] defendant's right to a fair trial." *Id.* (emphasis added).

Accordingly, it was a reasonable application of Supreme Court precedent for the California Court of Appeal to determine that, although in its view the wearing of victims' photographs in a courtroom is inherently prejudicial, the button-wearing in this case did not actually deprive Musladin of his right to a fair trial.

Filed 5/14/03

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MATTHEW MUSLADIN,	**NO. C 00-1998 JL**
Petitioner,	
	ORDER DENYING
v.	**WRIT OF HABEAS**
	CORPUS
ANTHONY LAMARQUE, Warden,	
Respondent.	

INTRODUCTION

The petition of Mathew Musladin ("Petitioner") for writ of habeas corpus was fully briefed on August 20, 2001. The Attorney for Petitioner is Assistant Federal Public Defender David Fermino. Attorney for Respondent is Deputy Attorney General Gregory A. Ott. The matter having been fully considered and good cause appearing, it is hereby ordered that the petition is denied.

I. PROCEDURAL BACKGROUND AND STANDARD OF REVIEW

Musladin filed this petition on June 5, 2000 pursuant to Title 28 U.S.C. § 2254(a). Both parties consented to proceed before a United States Magistrate Judge. *See* 28 U.S.C. § 636(c). Attorney Cliff Gardner withdrew as counsel on June 27, 2002. The court appointed Assistant Federal Public Defender David Fermino on August 20, 2002. The petition is before the court for review pursuant to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases.

Review of Petitioner's claim is subject to the provisions of the Anti-Terrorism and Effective Death Penalty Act. Under AEDPA, a federal court may reverse a state court's decision

denying relief only if that decision is "contrary to, or involves an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2554(d)(1). This Court may rely only on constitutional principles that have been established in this District or Circuit that have been sufficiently addressed by the United States Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 381 (2000).

II. FACTUAL BACKGROUND

Petitioner and Pam Musladin were married but separated at the time of the homicide of which Petitioner was convicted. Pam was living at her mother's house with her brother Michael Albaugh, her boyfriend Tom Studer, and Garrick Musladin, her four year old son by Petitioner. On the day of the subject incident, Petitioner was at Pam's home to pick up their son for his scheduled weekend visitation. The remaining facts are in dispute.

Pam Musladin testified as follows: she and Petitioner were having a discussion in the driveway of the house. Petitioner became angry and pushed her to the ground. Michael Albaugh and Tom Studer came out of the house. Mr. Albaugh attempted to calm Petitioner while Mr. Studer helped Pam to her feet. Petitioner then reached under the seat of his car. When Mr. Albaugh yelled, "He's got a gun," Pam and Mr. Studer began to run up the driveway. Petitioner fired his weapon towards them and struck Studer in the back of the shoulder. Studer fell to the ground and attempted to climb underneath the truck in the garage. Petitioner entered the garage and fired a second shot into Studer's head.

Petitioner presented a different version of these events. He said Michael Albaugh and Tom Studer left the house and entered the garage. He became fearful when Albaugh and Studer threatened him from inside the garage. Although Petitioner stated he could not see their faces because of the poor lighting, he believed that Albaugh was carrying a machete and Studer a gun. Petitioner testified that Albaugh came towards

him. Petitioner then turned his attention to Pam, who was yelling for someone to remove her child from the front yard.

Petitioner then looked back into the garage, where he thought Studer was still holding the gun. Petitioner claimed that he fired into the garage out of fear for his own life. Petitioner testified that he believed he had struck Studer, the intended target, with the first bullet. Petitioner then decided to move up the driveway closer to the garage. After hearing a noise, Petitioner fired his gun a second time at an unidentified target.

III. TRIAL COURT PROCEEDINGS

On December 27, 1994, the Santa Clara County District Attorney filed a four count information: one count of murder in violation of California Penal Code section 187, including a personal firearm use allegation; one count of attempted murder in violation of sections 187 and 664, also with a personal use allegation; one count of burglary in violation of section 459; and one count of assault in violation of section 245(a)(2), also with a personal use allegation. Petitioner pled not guilty to all charges.

Petitioner was tried by a jury and convicted of first degree murder on November 1, 1995. The trial court sentenced him to a 25-year-to-life term on count one, adding a four year middle term for the use allegation. The court added a three year term for the assault count and a concurrent term for the attempted murder conviction. The court stayed punishment on count three, as well as the use allegations in counts two and four.

Petitioner timely filed a notice of appeal. On December 9, 1997, the California State Court of Appeal affirmed his conviction. On March 23, 1998, the California Supreme Court denied his timely petition for review. The time to petition for certiorari from the United States Supreme Court expired on June 21, 1999. Petitioner filed a petition for writ of habeas corpus in state court on June 16, 1999, which was denied on June 2, 2000. He filed this petition for habeas review in federal court on June 5, 2000.

This court issued an Order to Show Cause on October 19, 2000, instructing the Attorney General's Office to respond to the petition. An Answer was filed on May 14, 2001. Petitioner filed a Traverse to the Answer on August 16, 2001.

IV. DISCUSSION

Petitioner asserts six separate errors by his counsel and the trial court, which he contends requires the reversal of his conviction. First, he alleges three errors by his attorney, resulting in ineffective assistance of counsel: (1) failure to present testimony that the victim had previously threatened to kill Petitioner, (2) failure to call an expert witness to testify that the entry path of the first bullet was not inconsistent with a theory of self-defense, and (3) failure to request a limiting instruction on the double hearsay testimony of Garrick Musladin, who was four years old at the time of the homicide.

Petitioner next alleges three errors by the trial court: (I) failure to allow Petitioner's attorney to participate in the formulation of a response to a question from the jury during deliberations, (2) allowing the victim's family to wear buttons displaying the victim's photograph during the trial, and (3) exclusion of key evidence essential to Petitioner's defense.

A. Petitioner's Ineffective Assistance of Counsel Claims

Petitioner contends that he was denied his Sixth Amendment right to effective assistance of counsel which required him to protect the defendant's fundamental right to a fair trial. The "benchmark" for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

The Court in *Strickland* outlined the proper analysis of a claim for ineffective assistance of counsel. *Id.* "First, the defendant must establish that counsel's performance was deficient. This requires showing that counsel made errors so

serious that he was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. Petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. The relevant inquiry is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable. *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998).

"Second, the Petitioner must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 688. The test for prejudice is not outcome-determinative; defendant need not show that the deficient conduct more likely than not altered the outcome of the case. However, a simple showing that the defense was impaired is not sufficient. *Id.* at 693. The Petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the fundamental fairness of the outcome. *Id.*

Petitioner admitted shooting Studer. He claimed that he was in danger and shot in self-defense. The issue before the jury was whether Petitioner honestly believed that he was in danger, or whether he acted with malice and intended to kill Studer. Petitioner asserts that his attorney committed three critical errors in trying his case.

1. Petitioner Claims That In a Homicide Case Where the Defendant's Entire Theory is Self-Defense, the Failure to Present Testimony That the Victim had Explicitly Threatened to Kill Defendant Violated his Sixth Amendment Right to the Effective Assistance of Counsel

a. Petitioner's Argument

Petitioner proffered that in late 1993 his supervisor at work -- Mr. Ruberg, noticed that Petitioner's phone line was in use for an extended period. Finding this unusual, Ruberg listened in on the line. He heard a female yelling at Petitioner, who responded that he did not want his son "over there." The woman began yelling that Petitioner was being uncooperative. The woman's end of the phone was taken over by a man who stated, "You better leave us the fuck alone or I'll kill you." The man then hung up the phone.

Defense counsel did not call Mr. Ruberg to testify during trial about this prior threat against Petitioner. Petitioner then believed and now maintains that the man on the phone was Tom Studer, the victim. This testimony could have been relevant to Petitioner's state of mind on the day he killed Studer. Petitioner asserts there was no tactical justification for this omission. Because his counsel failed to present credible evidence of prior threats of violence by the victim against him, Petitioner asserts that the jury was deprived of significant evidence regarding his state of mind, which was critical to his defense.

b. The State's Response

The State counters that Petitioner failed to show either error or prejudice. The State asserts that defendant's trial attorney did not present evidence of the phone conversation because the attorney was unaware of it. Petitioner cannot claim error on the part of his attorney when in fact Petitioner failed to disclose the facts to him. The State also claims that Petitioner cannot show prejudice. Defendant could have testified about the conversation regardless of whether Ruberg was called. Further,

the State suggests that Mr. Ruberg would not have been permitted to testify as to the identity of the parties, since it would constitute inadmissible hearsay. Respondent maintains that the state court's rejection of Petitioner's *Strickland* contention regarding the prior threat was not clearly erroneous.

c. Legal Analysis

Petitioner alleges that he did tell his trial attorney that he had been threatened at work. However, he failed to give to tell counsel who he believed threatened him. *See* Petitioner's Traverse to Answer, Exhibit A. To satisfy the first prong of *Strickland*, Petitioner must show that defense counsel's failure to introduce evidence was unreasonable. While trial counsel does have a duty to investigate, he is not required to interview every conceivable witness. *U.S. v. Schaflander*, 743 F.2d 714, 719 (9th Cir. 1984). Trial counsel apparently did not know there was a witness who heard both ends of the conversation. Further, Petitioner's declaration does not suggest that trial counsel was informed that the threats could have been made by the victim. Thus trial counsel's failure to investigate was not unreasonable.

Petitioner is also unable to satisfy the second *Strickland* requirement. He cannot show that, but for the failure to introduce evidence of a prior threat, there was a reasonable probability that the result of the proceedings would have been different. The jury heard substantial evidence suggesting malice. Regardless of whether there was justification for firing the first bullet, Petitioner's own testimony refutes the need for firing a second. Mr. Albaugh was with Petitioner's son Garrick and did not have a weapon that could injure Petitioner from a distance (or possibly any weapon at all). Pam Musladin had no weapon. Tom Studer had been struck by the first bullet and was trying to hide under the truck in the garage. If Petitioner truly feared for his life, it is highly unlikely that he would have entered a dark garage after a man with a gun. He could have gotten into his car and safely driven away. Given the particular facts of this case, Petitioner cannot establish that his counsel

was so ineffective as to undermine confidence in the fairness of the result.

2. Petitioner Claims That in a Homicide Case Where the Entire Theory is Self-Defense, the Failure to Present Expert Testimony That the Entry Path of the First Bullet Was Not Itself Fatally Inconsistent With the Self-Defense Theory Violated the Sixth Amendment Right to Effective Assistance of Counsel

a. Petitioner's Argument

Petitioner alleges that after Michael Albaugh yelled, "He's got a gun", (referring to Petitioner), Petitioner looked into the garage where he saw someone else holding a gun. Out of fear, Petitioner fired first. The bullet entered the back side of Tom Studer's shoulder. Petitioner contends that his attorney should have called an expert to explain that the rear entry wound could be consistent with his self-defense theory.

Expert testimony is necessary when lay persons are unable to make an informed judgment without the benefit of such testimony. *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999). In support of his contention Petitioner proffers the Declaration of John Thornton, a forensic scientist, who if called would have testified that Studer could have turned his torso after the shot was fired and before being struck. Without this testimony the jury could presume that self-defense was not possible because Studer had his back to Petitioner when he was shot.

b. The State's Response

The State maintains there was no error. Petitioner retained a forensic expert. Trial counsel was entitled to rely on his expert's opinions and conclusions - - even if they contradicted the theory that Studer turned before he was shot. Further, Petitioner's claim that John Thornton was available and could have testified is flawed. Mr. Thornton's evaluation is based on testimony adduced at trial and, therefore, amounts to the fabled

"twenty-twenty vision of hindsight."

The State also disputes Petitioner's contention that he was prejudiced by this failure. There was significant evidence of Petitioner's malice and premeditation. It is unlikely that the failure to present this expert's evidence changed the outcome, since Petitioner entered the garage and shot Studer a second time.

c. Legal Analysis

Trial counsel's failure to consult with more experts was not unreasonable because he retained an appropriate expert whom he thought to be well qualified. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998). Because that expert did not suggest that additional experts in the same field were necessary, counsel did not have a duty to seek out others.

Petitioner cannot show prejudice. Even if his counsel had retained an expert to testify that the entry wound was not inconsistent with self defense, there is no reasonable probability that the result would have been different. The jury did not believe Petitioner's version of the events of the day in question. Even if he feared for his life prior to firing the first bullet, it does not explain his subsequent actions. He walked into a dark garage and shot Studer. Expert testimony that the victim turned his back after Petitioner shot him may not have been convincing. The state court's rejection of Petitioner's claim regarding his counsel's failure to find a better expert is not a clearly erroneous application of *Strickland.*

3. Petitioner Claims That the Failure to Request An Instruction Limiting the Jury's Consideration of Double Hearsay Statements From an Incompetent Witness Violated the Sixth Amendment

a. Petitioner's Argument

During cross-examination of Michael Albaugh, defense counsel attempted to impeach Albaugh's claim that he had warned the others that Petitioner had a gun. Defense counsel

asked Mr. Albaugh why he believed that Petitioner was reaching for a gun when he appeared merely to be reaching into his car. Albaugh testified that his belief was based upon a statement made to him by Petitioner's son Garrick. Defense counsel failed to object or move to strike the answer. On redirect, the prosecutor attempted to elicit further information about the statement. Defense counsel asked to approach, presumably to object to further inquiry about the statement of a young child, and the judge responded by claiming that counsel had "opened the door." The court then overruled the objection.

Petitioner contends his counsel should have requested a limiting instruction as to this double hearsay testimony. Under state law, the responsibility for ensuring that the jury is fully instructed on the principles applicable to the defense theory of the case does not fall upon the trial judge alone. Defense counsel has an obligation to ensure that the trial court does not omit critical instructions. *See People v. York,* 242 Cal.App.2d 560, 572 (1966); *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn.7, *overruled on other grounds.*

Petitioner asserts that because of this error by counsel, the prosecution was able to argue to the jury that the child's alleged statement that Petitioner told him he had a gun and was going to shoot the victim was true. The statement, in fact, was admitted by the trial court to indicate why Albaugh thought Petitioner was reaching for a gun, and not for the truth of the matter asserted that Petitioner had a gun. Without a limiting instruction, however, the jury was free to consider the testimony however it chose.

b. The State's Response

The State maintains that the decision not to request the limiting instruction was a tactical decision made by the trial attorney. Because the testimony was harmful to Petitioner, his counsel reasonably decided not to draw further attention to it. Defense counsel's choice not to pursue a limiting instruction does not fall below an objective standard of reasonableness.

c. Legal Analysis

The decision not to request a limiting instruction is "solidly within the accepted range of strategic tactics employed by trial lawyers in the mitigation of damning evidence." *U.S. v. Gregory*, 74 F.3d 819, 823 (7th Cir. 1996); *Biggerstaff v. Clark*, 999 F.2d 1153, 1155 (7th Cir. 1993), *U.S. v. Malik*, 928 F.2d 17, 23 (1st Cir. 1991), *U.S. v. Miller*, 895 F.2d 1431, 1439 (D.C. Cir. 1990). Accordingly, Petitioner's contention that the failure to request the instruction constituted ineffective assistance of counsel does not satisfy the first prong of the *Strickland* test.

For the aforementioned reasons, Petitioner likewise fails to satisfy the second prong of *Strickland*. Accordingly, the state court's rejection of this ineffective assistance of counsel claim is not contrary to, or an unreasonable application of, the *Strickland* decision.

B. Petitioner's Assertions of Error By the Trial Court

1. Petitioner Claims that the Trial Court's Refusal to Allow Defense Counsel to Participate in Formulating a Response to the Jury's Question About Malice and the Substance of his Answer Violated Defendant's Constitutional Rights

a. Petitioner's Argument

Petitioner's fourth argument arises from a question by the jury on the second day of deliberations. The jury asked the court whether malice could be implied for a first degree murder conviction. When the court received the question, Petitioner's attorney was summoned. Prior to his arrival at the courthouse, however, the judge directed the jury to refer back to the instructions. Thereafter the jury returned a verdict, finding Petitioner guilty of first degree murder.

Petitioner claims that the trial court's failure to wait for his attorney to arrive and assist in the formulation of a response was a violation of his constitutional rights. He maintains that the

question demonstrates the jurors were confused about the issue of malice. Defense counsel would have insisted that the court, rather than referring the jury back to the instructions, explicitly state that express malice is necessary to convict a defendant of first degree murder. By excluding counsel from participating in this process, Petitioner contends that the court denied him the assistance of counsel during a critical stage of the proceedings.

Further, Petitioner claims that the substance of the trial court's response amounted to an abdication of its responsibility to directly and unequivocally resolve the issue of orderly conduct of the trial by jury. The jury requested clarification of a legal issue that was central to the trial. The court had a duty to respond to the question without referring the jury back to the instructions which caused the confusion.

b. The State's Response

The State maintains that this claim is barred by the state court's finding of waiver. The California Court of Appeal pointed out that it was apparent from the record that "counsel was aware of the court's communication with the jury, yet failed to object. Accordingly, the issue is waived." Answer, Ex. F at 23. Respondent suggests that the California Supreme Court implicitly agreed.

The State also argues that federal review of this claim is barred unless Petitioner can show cause for the federal default as well as actual prejudice, or that the failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The State argues that even if Petitioner can demonstrate cause, he cannot show prejudice because the error was harmless. *Chapman v. California*, 386 U.S. 18 (1967).

The State argues that even if error occurred, Petitioner was not prejudiced under the *Chapman* standard. *Id.* The reviewing court must be able to declare beyond a reasonable doubt that the error was harmless. *Id.* at 24. Respondent suggests because the jury instructions included definitions of different types of malice and because the instruction on first degree murder stated that

express malice was required, the jury was properly informed. The court's error was harmless beyond a reasonable doubt.

c. Legal Analysis

1. Waiver

The State is incorrect that Petitioner waived this claim. He first raised it on appeal. The appellate court ruled that the claim had been waived because counsel failed to object. In state habeas proceedings, Petitioner argued that the appellate court resolved the issue with a significant misunderstanding of the facts. The California Supreme Court ordered the State to respond to Petitioner's contention. After reviewing the briefs, the Court simply denied the Petition for Habeas Corpus.

Under California law a state court considering a habeas petition must explicitly rule on procedural bars asserted by the State. If the court denies the petition without specifically ruling on the procedural issue, it is understood that the ruling is on the merits. *In re Robbins*, 18 Cal.4th 770, 814 (1998). Because the California Supreme Court simply denied the petition without addressing the issue of waiver in its order, Petitioner's claim is not procedurally barred.

2. The Trial Court's Substantive Error

Petitioner asserts correctly that the substance of the trial court's response to a jury question was improper. Both Ninth Circuit and California law instruct trial courts to provide straightforward responses to jurors' questions. *U.S. v. Warren*, 984 F.2d 325, 330 (9th Cir. 1993). Courts must decide whether further explanation is desirable or whether reiteration of previously given instructions will suffice. *People v. Moore* (1996) 44 Cal. App. 4th 1323, 1331.

Respondent contends that the standard of review is harmless error under *Chapman*. In *Brecht v. Abramson*, however, the United States Supreme Court specifically held that *Chapman* analysis was inappropriate for habeas review of alleged constitutional error. 507 U.S. 619, 637 (1993). "Overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under

Chapman undermines the States' interest in finality and infringes upon the sovereignty over criminal matters." *Id.* at 637. *Brecht* instructs that trial errors be reviewed as to whether the error "had a substantial and injurious effect or influence in determining the jury's verdict." *Id.*, citing *Kotteakos v. U.S.*, 328 U.S. 750 (1946).

This court found no opinion by the United States Supreme Court holding that referring a jury back to its original instructions constitutes a structural error. As both the Petition and Answer rely on a harmless error standard, the parties appear to agree that this is a type of error which does not require automatic reversal. Under *Kotteakos* and *Brecht*, the issue becomes whether the court's response had a substantial and injurious effect or influence in determining the jury's verdict.

In view of the State's evidence against the Petitioner, it cannot be said that the court's response substantially affected the determination of guilt. The testimony of Michael Albaugh regarding the statements made by Garrick Musladin presented strong evidence of Petitioner's intent: he had a gun. The testimony of Michael Albaugh and Pam Musladin regarding the circumstances of the crime further demonstrate this intent. The jury apparently did not believe that Petitioner felt threatened by the victim. A substantively proper response to the question might not have changed the verdict. Accordingly, the state court's rejection of Petitioner's assertion of error in this regard was not contrary to, or an unreasonable application of, established federal law.

3. Was the Court's Response to the Jury in the Absence of Defense Counsel Structural Error?

Some constitutional violations at trial constitute "structural errors" and require automatic reversal of a conviction because they infect the entire trial process. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Such an error is prejudicial per se and harmless error analysis is not applicable. The Supreme Court has found structural errors in a very limited class of cases: *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (total deprivation

of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (lack of an impartial trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of grand jurors of defendant's race); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (the right to self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (the right to a public trial); *Batson v. Kentucky*, 476 U.S. 79 (1986) (unlawful exclusion of petit jurors of defendant's race); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (erroneous reasonable-doubt instruction to jury).

When counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding, the Supreme Court has consistently found constitutional error without any showing of prejudice. *U.S. v. Cronic,* 466 U.S. 648, 659 (1984), citing *Geders v. U.S.*, 425 U.S. 80 (1976), (complete failure of defense counsel to subject prosecution's case to "meaningful adversarial testing"). California courts agree: a defendant "is entitled to the assistance of counsel at all critical stages of the proceedings under the Sixth Amendment of the United States Constitution." *People v. Stewart* (1983) 145 Cal.App.3d 967, 972. Under both federal and California law jury deliberations constitute a critical stage in the trial. *U.S. v. Rosales-Rodriguez*, 289 F.3d 1106 (9th Cir. 2002); *People v. Hawthorne* (1992) 4 Cal. 4th 43, 69.

Under federal law, a key factor in evaluating the constitutionality of a court's response to a question from a deliberating jury, outside the presence of counsel, is whether the court responds substantively or merely refers the jury to its instructions. The Sixth Circuit found harmless error where both the prosecution and the defense were absent when the judge responded to a jury question. The court applied Rule 43, Federal Rules of Criminal Procedure.

The reviewing court found that a defendant's right to be present at every stage of trial was technically violated when the district court failed to contact parties before responding to a note from the jury asking for copies of instructions read to them earlier. However, *the error was harmless where the court did*

not make a substantive response to the note but, rather, perfunctorily responded by providing the jury with a complete written set of all jury instructions read by the court. U.S. v. Harris, 9 F.3d 493, 499 (6th Cir. 1993). (Emphasis added)

California law requires that any questions posed by the jury regarding the law or the evidence must be answered in open court in the presence of the accused and his or her counsel, unless presence is waived. (Section 1138, California Code of Criminal Procedure). Applying this rule, the California Supreme Court held that communication between judge and jury during deliberations without affording defendant and counsel an opportunity to be present impinges on a defendant's constitutional right to the assistance of counsel. *People v. Hawthorne* (1992) 4 Cal.4th 43, 69.

The Court in that case conceded that the trial court technically violated section 1138 by responding to the jury's notes without consulting counsel. *However, the trial judge did not give the jury any substantive instructions*. The jury had asked the bailiff to call the judge at home to ask what they should do if one of their members was undecided. He told them to continue deliberating while he contacted counsel to formulate a response. Before he responded, they informed him they could continue deliberating without further guidance. *Id.* at 64.

At petitioner's trial the judge responded to the jury's question about malice by referring them to the jury instructions, without any substantive response. As discussed above, if defense counsel had been present, the court's action would have been error, albeit probably harmless error, as also explained in the section above, because the judge did not respond substantively to the question. *U.S. v. Warren*, 984 F2d at 330; *People v. Moore*, 44 Cal.App.4th at 1331.

With defense counsel absent, however, this was the only response the judge could give, to avoid depriving petitioner of his constitutional right to counsel at a critical stage in the trial. Accordingly, the error was harmless, and the writ should be denied on this issue.

2. Petitioner Claims That the Trial Court Violated His Right to Due Process When it Allowed the Victim's Family to Wear Large Display Buttons Containing Pictures of the Deceased

a. Petitioner's Argument

Petitioner asserts that the trial court committed error when it allowed the victim's family to wear buttons with the victim's picture throughout the trial. Petitioner argues that the Due Process Clause requires trial courts to safeguard against the "intrusion of factors into the trial process that tend to subvert its purpose." *Estes v. State of Texas*, 381 U.S. 532, 560 (1965). These factors include any courtroom practice that would undercut the presumption of innocence. Petitioner maintains that the buttons were inherently prejudicial and imposed an unacceptable threat to his right to a fair trial.

In reviewing this alleged error, Petitioner suggests a two- step analysis. First, was there an impermissible factor coming into play? *Id.* Second, did the factor pose an unacceptable risk? *Holbrook v. Flynn*, 475 U.S. 560 (1986).

b. The State's Response

The State maintains that the buttons did not result in prejudice. When the defense attorney formally objected to the buttons, the trial judge became aware of the issue. At that time, the judge determined that the buttons would not prejudice the defendant. The State argues that the trial court's finding is supported by the record and deserves strong deference.

The State also points to the opinion of the state court of appeal, as follows:

> In contrast with the buttons in *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990)], the message to be conveyed by the Studer family wearing buttons is less than clear. The simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member. While we consider the wearing of photographs of victims in a

courtroom to be an 'impermissible factor coming into play,' the practice of which should be discouraged, we do not believe the buttons in this case branded defendant 'with an unmistakable mark of guilt in the eyes of the jurors.' (Answer Ex. F at 21-22.)

c. Legal Analysis

The record reflects that three members of the victim's family each wore a button with the victim's photograph during the trial. The buttons were two to four inches in diameter and contained no words or symbols. The family members sat directly behind the prosecution and next to the jury.

Petitioner is correct in his assertion that a trial judge is required to protect the integrity of the proceedings by disallowing courtroom activity that may undermine the presumption of innocence. "One accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of . . . circumstances not adduced as proof at trial." *Holbrook*, 475 US at 567, citing *Taylor v. Kentucky*, 436 US 478, 485 (1978). When factors not adduced as proof are present during a trial, the trial judge must ascertain whether the factors are so prejudicial as to deny the defendant his constitutional right to a fair trial.

In *Estelle v. Williams*, the United States Supreme Court held that requiring a defendant during a trial by jury to wear identifiable prison clothing despite objection constituted a denial of due process and equal protection. 425 US 501, 502 (1976). Justice Burger advised that "courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." Because prison clothing is likely to elicit a negative impression of the defendant, it potentially undermines the presumption of innocence. Such clothing presents an unacceptable risk of impermissible factors coming into play. *Id.* at 505.

The United States Supreme Court has not specifically addressed the issue of buttons in a trial courtroom. The Ninth

Circuit however, in *Norris v. Risley*, held that the presence of women spectators wearing buttons reading, "Women Against Rape" created a prejudicial environment thereby posing an unacceptable threat to defendant's right to a fair trial. 918 F.2d 828, 834 (1990). The buttons were worn by approximately fifteen members of the Billings Rape Task Force and the word "rape" was highlighted. *Norris* suggests that a practice becomes unacceptable when it undermines the presumption of innocence or the right to confrontation. *Id.* at 831.

Just as the compelled wearing of prison garb during trial can create an impermissible influence on the jury throughout trial, the buttons' message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence. Moreover, the buttons' message was far more direct than that to be inferred from the wearing of prison attire, which has no communicative purpose. The women who wore the buttons obviously intended to convey a message. *Id.* at 832.

In both *Estelle* and *Norris*, the challenged practice related directly to the respective defendant's guilt. The jurors would infer guilt as a result of the practice. The fact that the defendant was in custody suggested he was dangerous, thereby undermining the presumption of innocence. The "Women Against Rape" buttons suggested that the defendant was a rapist.

The message to be derived from the buttons in this case, however, was not as clear. Although it amounted to a showing of solidarity by the victim's family, it did not necessarily undermine the presumption of innocence. The buttons were not inscribed with the word "MURDERER." The buttons were not worn by fifteen spectators who assumed defendant's guilt before it was proven. The victim's family testified and defense counsel had the opportunity for cross-examination.

The State Courts' rejection of Petitioner's claim was not a clearly erroneous application of *Estelle*. Although allowing the

buttons was arguably not a prudent decision by the trial judge, it cannot be said that it was contrary to or an unreasonable application of clearly established federal law. The writ cannot issue on this assertion of error.

3. Petitioner Claims That the Trial Court Violated His Right To a Fair Trial and His Right to Present a Defense By The Court's Repeated Limitations on Evidence

a. Petitioner's Argument

Petitioner details two instances in which the trial court excluded evidence that Petitioner sought to introduce in his defense. Defense counsel attempted to rebut the prosecutor's implication that the defendant manufactured a theory of self-defense in the intervening time between arrest and trial, by presenting evidence from the defendant, defendant's father, and defendant's brother showing that defendant had explained the self-defense claim on the day of the shooting itself. The second exclusion was of the defendant's testimony showing that he had reason to believe in a need for self-defense at the scene of the shooting; defendant claimed an awareness of drug-related activities taking place at the house and a history of being attacked and observing others being attacked while at the house. This evidence was excluded by the trial court.

Petitioner suggests that the right to present evidence is essential to due process, and that criminal defendants must be permitted to rebut specific theories proposed by the state. Under this analysis the trial court's exclusion of evidence is a violation of the defendant's Sixth Amendment right to present a defense and possibly his Fifth Amendment right to a fair trial. The critical question in analyzing the constitutionality of exclusion of evidence is the importance of the evidence to the defense's case. Petitioner suggests that the excluded evidence would have had a substantial influence on the jury's verdict and should have been admitted.

b. The State's Response

The State maintains that the evidence was properly excluded and that it did not violate Petitioner's constitutional rights. The statements by the defendant's father and brother indicating that defendant had asserted a self-defense theory on the day of the arrest were justifiably excluded by the trial court, because those statements constituted inadmissible hearsay evidence. The State agrees with the state courts' findings that the evidence supporting reasonableness was also inadmissible.

In the event that a challenge to the inadmissibility of the evidence might succeed, the State asserts that the exclusion nonetheless failed to constitute error of constitutionally significant proportions. It reaches this conclusion after application of the five factors in *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990). These factors include: "(1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense."

c. Legal Analysis

There are two subcategories of evidence at issue within this portion of the claim. The first includes evidence that defense counsel sought to introduce on redirect in order to rebut the implication created by the prosecutor that defendant fabricated his self-defense claim after the shooting. The potential evidence consisted of statements by the father and brother of the defendant that he had asserted a self-defense on the day of his arrest. The second subcategory reflects on the reasonableness of defendant's belief that he was in danger from the victim, and includes evidence that defendant knew of drug activity and prior incidents of violence at the house where the shooting occurred.

The first category of evidence was correctly excluded by the trial court. A defendant does not have a right to offer inadmissible evidence unless the defendant can establish that his right to have the jury consider the excluded evidence involves

a "fundamental principle of justice." See *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996). In determining whether Petitioner satisfied this requirement, the court considers: 1) the probative value of the evidence on the central issue, 2) its reliability, 3) whether it is capable of evaluation by the trier of fact, 4) whether it is the sole evidence on the issue or cumulative, and 5) whether it constitutes a major part of the attempted defense. *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990).

Petitioner would have used the evidence to rebut the prosecutor's argument that he had not previously claimed self-defense. Evidence that a defendant has previously claimed self-defense and evidence that he indeed acted in self-defense are not equivalent. For the purposes of both the prosecution and defense, this evidence does little to prove or disprove whether Petitioner acted in self-defense.

The reliability of the evidence is in doubt primarily because it was offered by kin of the defendant and because the implied fabrication may have arisen after Petitioner had a motive for it.

The excluded testimony is the sole evidence of whether Petitioner mentioned self-defense either on the day of his arrest or after the beginning of his trial. However, it is not the sole evidence of his claim of self-defense and serves primarily to rebut the prosecutor's implication that the self-defense theory was fabricated. This implication is only rebuttable by evidence that the defendant acted in self-defense, not merely by evidence that the defendant discussed self-defense with other persons.

Because the evidence in question concerns whether Petitioner mentioned self-defense prior to the trial, and not whether he acted in self-defense, it does not fulfill the fifth prong of the *Tinsley* test by constituting a major part of the attempted defense. It is only a response to the prosecutor's attempts to show the defendant fabricated his self-defense theory after the fact.

Assuming, arguendo, that the trial court excluded the evidence incorrectly, it has not been shown that the exclusion of evidence rises to the level of a constitutional violation.

The second category of evidence concerns Petitioner's awareness of drug activity and prior incidents of violence at the house where the shooting occurred. No threats were made against the defendant by the victim, and the events involved occurred four months to one year prior to the shooting at issue in this case. As the trial court noted (People v. Musladin, No. H01-5159, slip op. at 14-20 (Cal. Ct. App., filed Dec. 9, 1997) (*cert. denied*, filed Mar. 25, 1998)), there was no evidence to suggest that Petitioner reasonably associated the victim or any of the other people present at the house that day with specific threats or attacks against him. Threatening behavior associated with a particular place does not permit generalization of that behavior to everyone residing there. *See id.*

V. SUMMARY AND CONCLUSION

Petitioner alleges that his attorney provided ineffective assistance of counsel at several crucial points in the trial. The first claim, counsel's failure to proffer evidence of a specific threat against Petitioner, does not rise to the level of unreasonableness given the circumstances. Furthermore, even if evidence of a prior threat had been admitted, it would not have outweighed the lack of evidence that Petitioner faced a present threat from the victim at the time that the shooting took place.

The second claim concerns counsel's failure to provide an expert witness who would have testified that the bullet path was not inconsistent with the path of a bullet fired in self-defense. However, counsel called a qualified forensic scientist who did not suggest that other experts were necessary. Even if the bullet had been fired while the victim was facing Petitioner, there was no other evidence that self-defense was justified.

Finally, Petitioner claims that his counsel unreasonably failed to request a limiting instruction as to double hearsay. The failure to request a limiting instruction was reasonable as a tactical decision, and Petitioner cannot show that the outcome

would have been different if such an instruction had been granted.

Thus, Petitioner's claim of ineffective assistance are without merit.

Petitioner also alleges several errors by the trial court. The first is based on the jury's question which was critical to Petitioner's defense during its second day of deliberations. Defense counsel was summoned, but the court, without waiting for him to arrive -- answered the question by directing the jury back to the written instructions. This court finds that the trial's court's response was not error. Although the court might have been obliged to provide a more substantive response had defense counsel been present, in the absence of defense counsel the trial judge responded correctly by not providing the jury with additional instructions or evidence. Accordingly, the writ must be denied as to this issue.

The second alleged error committed by the court is its failure to prohibit the display of buttons featuring a picture of the victim in the courtroom. The buttons did not clearly constitute an unacceptable risk, and while perhaps imprudent, allowing the buttons was not contrary to or an unreasonable application of law.

The third alleged error concerns limitations on two categories of evidence that might have supported Petitioner's self-defense claim. However, both categories were correctly excluded by the trial court.

For all the reasons above, petitioner's writ of habeas corpus must be denied.

IT IS SO ORDERED.

DATED: May 14, 2003

s/_____
JAMES LARSON
United States Magistrate Judge

Filed 12/9/97

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA**

SIXTH APPELLATE DISTRICT

THE PEOPLE,	)	**H015159**
Plaintiff and Respondent,	)	
	)	**Santa Clara County**
v.	)	**Super. Ct. No. 177400**
	)	
MATHEW GUY MUSLADIN,	)	
Defendant and Appellant.	)	
	)	

A jury convicted defendant Mathew Guy Musladin of the first degree murder of Thomas Studer, the attempted murder of Pamela Musladin, burglary, and the assault of Michael Albaugh with a deadly weapon. (Pen. Code, §§ 187; 664/187; 459/460, subd. (a); 245, subd. (a)(2).) He appeals from the judgment of conviction, asserting various evidentiary and procedural errors. We affirm the judgment.

FACTS

Pamela Musladin married defendant on November 14, 1989, and their son Garrick was born March 25, 1991. Pamela filed for divorce in 1992, but the divorce was not yet final at the time the charged offenses occurred on May 13, 1994. Under the custody agreement, Garrick lived with Pamela, while defendant had visitation every other Friday.

Shortly before Pamela filed for divorce, defendant lost his temper during an argument with his wife. Pamela told defendant she wanted to leave him and live at her mother's

house. Defendant responded that a bitch like Pamela was not going to raise his son and that he would kill her first. Defendant proceeded to strangle Pamela. The incident was corroborated by police and medical reports.

On another occasion, Pamela had driven to Sacramento to pick up Garrick at the home of defendant's parents. As she was strapping the child into a car seat, defendant asked her whether she was a "Christian woman." When Pamela responded that she did not have to discuss her beliefs with defendant, he told her she could not have Garrick, removed the boy from the car, and dragged him into the house. When Pamela resisted, defendant shoved her, grabbed her by the hair, forced her into the house, then pushed her onto the couch, and started "ranting about me not coming back. He's wanting me to come back. He was just angry. He was just saying all the things he always said."

Pamela began seeing Tom Studer in February or March of 1993. By October 1993, they planned to marry. On May 13, 1994, the couple was living in the home of Pamela's mother at 539 Bluefield Drive in San Jose.

At approximately 1:30 p.m. on May 13, 1994, defendant arrived at the Bluefield Drive residence to pick up Garrick for visitation. Pamela, Tom, and Garrick were in the back yard, eating lunch. Michael Albaugh, Pamela's brother, saw defendant pull into the driveway, and yelled to Pamela that defendant had arrived. Not expecting defendant to arrive that early,[1] Pamela went into the house to get some clothes for Garrick.

After packing Garrick's things, Pamela went out to meet defendant. Defendant was standing near Tom's pick-up truck, looking inside. Upon seeing Pamela, defendant pointed to the truck and asked Pamela whether the truck "was part of her five

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[1] Pamela testified she had spoken with defendant that morning, and he had told her he would arrive later in the afternoon. She stated defendant had acted peculiarly on the phone.

year fucking plan," an apparent reference to a previous discussion when the two had discussed life plans, and Pamela said she wanted to go to nursing school, support herself, and eventually buy a house. Defendant then said, "I got a call from the district attorney this morning and that's the last straw. I don't have anything left to lose."[2] When Pamela started to cry, defendant threatened, "Either you sign full custody of Garrick over to me right now or I will blow both of your fucking heads off." Pamela started begging defendant, "Guy please, please, please, don't do this. It doesn't - please don't do this." She approached defendant to embrace him, but defendant knocked her hands away and shoved her onto the driveway. Garrick, who was sitting in defendant's car yelled to his father, "Don't hit my mommy."

Watching through a front bedroom window, Pamela's brother Michael saw defendant push Pamela to the ground, and ran outside to help her. Tom also heard the altercation and ran to the front of the house. While Michael attempted to pacify defendant, Tom helped Pamela from the ground.

Standing near his car, defendant reached under the front passenger seat where Garrick was sitting and pulled out a .45 caliber semi-automatic pistol, loaded with hollow-point bullets. Michael yelled, "He's got a gun," while Pamela and Tom started running to the garage. Defendant fired once at Pamela and Tom, hitting Tom in the shoulder. Tom fell, landing beside his truck. Pamela escaped through the back of the garage and ran to a neighbor's house to call 911. Tom tried to crawl underneath his truck. However, defendant walked to the front end of the truck and pointed the gun at Tom's head. While Michael pleaded with defendant to stop, defendant shot Tom in the head.[3]

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[2] The district attorney's office had called about defendant's refusal to pay child support.

[3] Tom's head injury apparently was the result of a ricochet.

Michael ran into the house and dialed 911. While on the phone, he heard defendant enter the house and walk down the hall to the bedroom. Michael dropped the phone, ran into the bathroom, and locked the door. Defendant kicked the door in and pointed the gun at Michael. When Michael pleaded with defendant not to shoot him, defendant lowered the gun and left.

The Santa Clara police officer who heard the dispatch regarding the murder and defendant's flight spotted defendant driving on a nearby freeway. Defendant was finally stopped and arrested. En route to the police station, defendant kept saying, "I didn't mean to do it. I'm sorry," and "Please, officer, forgive me."

At trial, defendant admitted shooting Tom, but claimed self-defense. He testified that when he arrived at the San Jose residence on May 13, 1994, Pamela told him she needed a few minutes to pack Garrick's things. Defendant thought that his wife looked high on "crank" or methamphetamine.[4] Defendant picked up Garrick and put him in the car.

Pamela returned about 10 or 15 minutes later with a diaper bag. Defendant denied the statements Pamela had attributed to him. His testimony was that he told Pamela he was being sued by two credit card companies for debts which belonged to her. In order to avoid the subject, Pamela tried to hug him. Exasperated, defendant pushed her away. Pamela, whose balance was terrible when she was under the influence, stumbled back about three or four steps and landed on her rear.

As defendant took the diaper bag, Pamela started screaming for help. Defendant then heard a commotion coming from inside the house and voices saying "Get him, let's get him" and "There he is, kill the fucking bastard." Defendant was scared, saw his gun case, and grabbed it. He turned around, looked into

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[4] Sergeant Michael Schembri, of the San Jose Police Department, interviewed Pamela at around 5 p.m. after the shooting. Although emotional, she did not exhibit the symptoms of being under the influence of crank.

the garage area, and saw people coming at him. He didn't see any faces, but recognized Michael's body. Michael said something like, "I'm going to do you," and raised his hand in which he was carrying a machete.[5] Still on the ground, Pamela yelled, "Get Garrick first." Defendant turned, took the gun from its case, got the magazine, and loaded the gun.

Defendant heard someone say, "He's got a gun." He saw a person in the garage who had a gun "kind of cocked down"[6] and who was not running, so he focused on him. Afraid for his life, defendant wanted to shoot before he got shot. He fired the gun, and thought he hit the person in the garage. He then moved up the driveway, away from Garrick, heard a loud noise, and fired again toward the right side of the garage where the noise had come from.

Stunned and scared, defendant got into his car and drove away, not realizing somebody was dead. Defendant did not intend to murder Tom or Pamela. He denied following Michael into the house after the shooting. Defendant admitted making incriminating statements to the police while en route to the police station, but explained that he was in shock and confused; he did not remember the ride too well.

Defendant stated that he had purchased the gun in compliance with all legal requirements in December of 1993. He bought the gun for protection when he was panning for gold. Defendant showed the gun to Garrick, just as he showed him everything. Defendant had planned to go gold panning with friends on May 9, but someone had canceled. He left all the equipment, including the gun, in his car.

Defendant's story was corroborated by several witnesses. Scott Owens, defendant's best friend, testified he had often gone gold panning with defendant and had seen the gun which defendant brought for protection against mountain lions.

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[5] Pamela denied her brother was carrying a machete.

[6] Pamela testified Tom had nothing in his hands.

Jacquelyn Schuller testified that she had planned to go gold panning with defendant and Cheryle Reed on May 10, but was called to work and could not make it. Cheryle Reed testified that because Schuller had an interview, the trip was canceled and they were going to go sometime the next week.

James Meeker, chief forensic toxicologist at Oakland's Institute of Forensic Science, testified that Tom's post-death blood sample tested positive for methamphetamine at levels of 1.55 micrograms per milliliter and 0.19 mcg/ml of amphetamine. The victim was "definitely under the influence," because people who test positive are usually only in the 0.1 to 0.5 range. Meeker stated that the usual side effect of this higher range were distorted feelings, increased anxiety, hyperactivity, mood swings, impaired judgment, irrationality, paranoia and aggressiveness. He concluded that it would not be unusual for someone operating under Tom's level of intoxication to become violent or confrontational.

DISCUSSION

Hearsay Testimony by Garrick

After the prosecution gave notice of its intention to call defendant's son, who was three years old at the time of the shooting and four-and-one-half at the time of trial, defendant moved to exclude the testimony on competency grounds. Following a competency hearing, the court granted defendant's motion.

During cross-examination of Michael Albaugh, defense counsel attempted to impeach Michael's claim that he had warned the others that defendant had a gun by referring to his testimony that defendant retrieved, turned, and fired the gun in one instantaneous motion, leaving no time for the warning:

"Q. There was one continuous motion that you observed, motion of him going down, getting a gun, turning around, leveling that and firing, is that correct?

"A. Yes.

"Q. But you had time to say, 'He's got a gun,' right?

"A. I said, 'He's got a gun' before he pulled it out when I saw

him reaching under the seat.

"Q. Oh, Mike. You knew he was going to pull a gun out?

"A. Yes, because previously Garrick had told me that he had that, his daddy had a gun." Defense counsel failed to object or move to strike Michael's answer.

When the prosecutor sought to explore Michael's testimony on redirect, the following colloquy occurred:

"[Prosecutor]: Mike, your nephew Garrick told you that the defendant showed him a gun, correct?

"A. Yes, he did.

"[Defense Counsel]: Your Honor, may we approach the bench here, Your Honor?

"THE COURT: You opened the door.

"[Defense Counsel]: I understand.

. . . . . .

"THE COURT: Objection overruled.

"[Prosecutor]: And when did he tell you that?

"A. About a month prior to this.

"Q. And where were you when he told you this?

"A. At our house.

"Q. And what did Garrick tell you?

"A. He said his daddy had a gun, he was going to shoot Tom with it.

"Q. And you had that in mind when you saw the defendant reach under the seat?

"A. Yes, I did.

"Q. And because of what Garrick had told you, you had a bad feeling that the defendant was going to arm himself at that time?

. . . . . .

"Q. So the two statements that you remember Garrick telling you is that his father had a gun?

"A. Yes.

"Q. And he intended to use it against Tom?

"A. Yes.

"Q. And this is how much prior to the homicide where the defendant killed Tom?

"A. About a month."

On appeal defendant contends the trial court should have excluded Garrick's entire statement as inadmissible multiple hearsay. He maintains that Garrick's statements lack sufficient guarantees of trustworthiness and do not fall within any exception to the hearsay rule. We disagree.

It is settled that a judgment will not be reversed because of an erroneous admission of evidence unless a timely objection was made in the trial court on the precise ground being raised on appeal. (Evid. Code,[7] § 353, subd. (a); *People* v. *Bury* (1996) 41 Cal.App.4th 1194, 1201.)

Defendant cites *People* v. *Wattier* (1996) 51 Cal.App.4th 948, 953 for the proposition that "an evidentiary issue should be addressed on appeal even if it was only marginally preserved when the question of its preservation 'is close and difficult . . . .'" This is not the law. *Wattier* quotes *People* v. *Bruner* (1995) 9 Cal.4th 1178, 1183, footnote 5 for this holding. However, the *Bruner* footnote dealt with the issue of defense counsel's failure to object to the trial court's denial of credit for presentence custody, a sentencing, rather than evidentiary, issue.

In the present case, the defense failed to object when Michael first stated that Garrick had said his father had a gun. It was not until redirect when the prosecutor attempted to explore this testimony that defense counsel asked to approach the bench. Assuming, as the court did, this constituted an objection, counsel never stated the specific ground of the objection. In his reply brief defendant argues that this court should not consider the issue waived since the trial court denied counsel the opportunity to approach and make the record clear.

Even if we assume that defense counsel raised a proper objection, no error occurred. Neither the statement that defendant had a gun nor the statement that he was going to shoot Tom constituted hearsay as they were not offered for the truth of the matter asserted. Rather, they explained Michael's

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[7] All further statutory references are to the Evidence Code.

state of mind at the time. Michael was aware that defendant had a gun prior to seeing it, because Garrick had told him both that his father had a gun and that he intended to use the weapon against Tom.

Defendant also asserts the statement that defendant intended to shoot Tom with the gun should have been excluded pursuant to section 352, even if was not hearsay. Here, again, we disagree. It must be remembered that defense counsel attempted to impeach Michael's claim that he had warned the others defendant had a gun. He impliedly asked how Michael knew defendant had a gun prior to actually seeing it. The fact that Garrick had not only said his father had a gun, but intended to use it was probative on the issue of Michael's state of mind. The idea that somebody has a gun does not mean that person is going to pull it from his car. The belief that defendant had previously threatened to shoot Tom was probative as to why Michael yelled out a warning. Although the statement was also prejudicial, we cannot say the court abused its discretion in overruling defendant's objection.[8]

Evidence of Self-Defense

Defendant contends he was deprived of his right to due process and a fair trial by the trial court's erroneous exclusion of evidence of his prior assertions of self-defense and the prosecutor's exploitation of these errors in closing argument. He specifically asserts 1) it was error to exclude evidence of his state of mind when he was interrogated by the police, 2) the prosecutor committed *Doyle*[9] error, and 3) he was prevented from presenting rebuttal evidence.

In defendant's first assertion he claims that although he was allowed to testify to his feelings of shock at the time of his

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[8] Having reached the conclusion that Garrick's statements were admissible, we need not decide whether defendant was denied effective assistance of counsel.

[9] *Doyle* v. *Ohio* (1976) 426 U.S. 610.

arrest and transportation to the police station, he was prevented from stating that these feelings developed into fear and intimidation at the police station. He maintains the excluded evidence explained why he did not make a self-defense claim at this time. Defendant's claim is based on the following exchange during direct examination by defense counsel:

"A. They brought me into a room. . . . I remember - the next clear memory I have is that he said he was charging me with one count of first degree murder.

"Q. What was your response to that, if anything, Guy?

"A. I said I didn't murder -

"[Prosecutor]: Objection.

"THE COURT: Pardon.

"[Prosecutor]: Objection.

"THE COURT: Sustained.

"Q. Were you frightened by this officer or any other officer?

"[Prosecutor]: Objection, Your Honor. Relevance.

"THE COURT: Sustained.

"Q. Did they advise you of your rights, Guy?

"A. Another man came in. I keep -- I believe it was a Hispanic man. I don't know the name, I'm not sure. But he read me my rights."

"Q. And did you exercise your rights?

"A. I said this isn't really happening but if it is I need a lawyer. You know, I said I can't -- this isn't happening.

"Q. Did you feel intimidation by these officers?

"[Prosecutor]: Objection, Your Honor. Leading.

"THE COURT: Sustained.

"Q. What was going through your mind after you had exercised your right to these officers?

"[Prosecutor]: Objection. Relevance.

"THE COURT: Sustained."

Defendant's claim must be rejected for the simple reason counsel never made clear the relevancy of his questions. He never specifically asked defendant why he had not mentioned self-defense at the police station.

Defendant's cited authorities, *Crane* v. *Kentucky* (1986) 476 U.S. 683 and *United States* v. *Roark* (11th Cir. 1985) 753 F.2d 991, are inapposite to the case at bench. Those cases hold it is error to exclude evidence suggesting the unreliability of a confession. In this case, defendant does not attempt to challenge the credibility of what he said. Rather, he is attempting to explain his silence concerning the self-defense claim.

Defendant next claims *Doyle* error based on the prosecutor's following cross-examination on his self-defense claim:

"Q. All right. So now you're in the ride home or in the ride from [highway] 101 to the police station and now you're beginning to remember - you're concerned that, I got this gun in the car, correct?

"A. Yes.

"Q. And now you've remembered that you may have shot and hit somebody, right?

"A. Yes.

"Q. So why don't you, at that time, sir, tell the police on the way from 101 to the police station that they came after me and made all these death threats against me?

"A. I don't think I mentioned that until later. I was just in shock. I was stunned.

"Q. Sir, you never mentioned that.

"A. I may have.

"Q. Sir, has anyone in this court testified besides yourself to self-defense?

"A. Excuse me?

"Q. Has anyone in this court in the course of this trial besides yourself ever mentioned that you said you did it in self-defense?

"A. I don't believe so."

At the outset we note that the Attorney General urges this court to hold that a defendant must timely object to *Doyle* error or waive the issue on appeal. (See, e.g., *People* v. *Kelly* (1981) 125 Cal.App.3d 575, 581.) However, as recently acknowledged, the Supreme Court has never applied the waiver

doctrine to *Doyle* error. (See *People* v. *Evans* (1994) 25 Cal.App.4th 358, 369.) Accordingly, we address the claim of error on its merits.

Doyle holds that once an arrestee chooses to remain silent after being admonished pursuant to *Miranda* v. *Arizona* (1966) 384 U.S. 436, the prosecution cannot use the fact of that silence to impeach an exculpatory story told for the first time at trial. In *Fletcher* v. *Weir* (1982) 455 U.S. 603, 607, the high court explained that its holding in *Doyle* applied only when *Miranda* warnings had first been given. The court stated, "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." Thus, the admission of evidence of pre-*Miranda* silence to rebut a defense claimed for the first time at trial is permitted. (*People* v. *Delgado* (1992) 10 Cal.App.4th 1837, 1841-1842.)

In the present case, it is clear that any questions regarding defendant post-arrest, pre-*Miranda* silence regarding self-defense were admissible. Defendant maintains that the prosecutor's question, "Has anyone in this court in the course of this trial besides yourself ever mentioned that you said you did it in self-defense?" implicitly urged the jury to infer from defendant's post-*Miranda* silence that he had recently contrived his testimony. However, given the context in which the question was raised, the question merely related to defendant's pre-*Miranda* silence.

Finally, defendant asserts he was prevented from presenting evidence to rebut the inference of recent fabrication. Recognizing that the prosecutor's questions had undermined the defense, defense counsel attempted to present testimony by defendant's father and defendant himself that defendant had disclosed his self-defense claim long before trial. A portion of the direct examination of defendant's father was as follows:

"Q. Now, Mr. Musladin did your son call you on May 13, 1994?

"A. Yes, he did.

"Q. Did he call you from the county jail?

"A. Yes.

"Q. And did he tell you that -

"[Prosecutor]: Objection, Your Honor. Hearsay.

"[Defense Counsel]: Your Honor, I think he's opened up the door about this self-defense, Your Honor.

"[Prosecutor]: No.

"THE COURT: No. This is still hearsay."

Additional evidence that defendant called his father and brother from jail on May 13, was also excluded.

Defendant submits the testimony was admissible over a hearsay objection pursuant to section 1236 as a prior consistent statement. However, that statute requires the evidence be offered in compliance with section 791. Section 791 provides in relevant part: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: . . . (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated . . . and the statement was made before the . . . motive for fabrication . . . is alleged to have arisen."

We agree with the Attorney General that section 791 is inapplicable on its face. It is undisputed that defendant phoned his father and brother from the police station after Tom was shot, i.e., after his "motive for fabrication . . . is alleged to have arisen." When a prior consistent statement is made by a criminal defendant after he has been charged with first degree murder, we find no merit to the contention that "defendant's most compelling time to fabricate a defense would occur at the time the case was set for trial after the period of pretrial motions."

Evidence of Michael Albaugh's Violence and Drug Use

Defendant contends the trial court erred by excluding evidence of Michael Albaugh's 1986 misdemeanor convictions for resisting arrest and possession of a nunchaku as well as his

history of drug use. He asserts the evidence was necessary to show a "common scheme" under section 1101, subdivision (b) in support of defendant's self-defense claim. He maintains the evidence was essential to show he was already reasonably afraid of Michael because of his past history. We disagree.

"It has been said that a trial court is vested with wide discretion in determining the relevance of proffered evidence. However, it has also been said that in determining the admissibility of evidence proffered by a defendant in a criminal case, a trial court should give the defendant the benefit of any reasonable doubt. But this does not mean that a trial court is required to allow the defendant to define the issues or to introduce evidence without regard to its relevance to the issues defined by law. A trial court has no discretion to admit irrelevant evidence." (*People* v. *Honig* (1996) 48 Cal.App.4th 289, 342-343, internal citations omitted.)

Evidence of prior bad conduct is admissible only where the evidence is relevant to prove some fact, such as common plan or scheme, other than the disposition to commit such an act. (§ 1101, subd. (b).) To establish a common plan or scheme, the evidence must demonstrate not merely a similarity in the results, but "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*People* v. *Ewoldt* (1994) 7 Cal.4th 380, 393, internal quotation and citation omitted; see also, *People* v. *Balcom* (1994) 7 Cal.4th 414, 423.) In addition, there must be a connecting link between the prior and present acts. (*Ewoldt, supra*, at p. 397.)

According to a police report from the 1986 incident,[10] Michael and three friends approached a police officer in a threatening manner. Michael was carrying a nunchaku. When the police officer drew his baton, Michael threw the nunchaku in some nearby bushes. Michael did not strike or attempt to

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[10] The report is not part of this record. Rather, the summary of facts is taken from the arguments presented by the prosecutor and defense counsel.

strike the officer, with or without the nunchaku. He did give the officer a verbal bad time. This incident lacks the concurrence of common features as defendant alleges occurred on May 13. In addition, there is no connecting link between the two incidents.

Moreover, "evidence of prior misconduct committed with persons other than the prosecuting witness . . . is admissible to show a common design or plan where the prior offenses (1) are not too remote in time, (2) are similar to the offense charged, and (3) are committed upon persons similar to the prosecuting witness." (*People* v. *Ewoldt, supra*, 7 Cal.4th at pp. 397, internal quotation and citation omitted.) Defendant failed to meet any of these requirements. Accordingly, we find no abuse in the trial court's exclusion of the 1986 misdemeanors.

We find even less merit in defendant's claim that the trial court limited evidence of Michael's history of drug abuse. On direct examination Michael admitted that he had used methamphetamine on the night before the murder. On cross-examination, defense counsel questioned him about his recent use of the drug and how methamphetamine affected him generally and on the day of the murder. Cross-examination by the defense was only limited on the time fime prior to "several days" before the murder. Such evidence was irrelevant.

Violence at Pamela's House

In an attempt to bolster the claim that defendant experienced fear and trepidation each time he went to Pamela's house, the defense attempted to introduce evidence that 539 Bluefield Drive was an unsavory site of drugs and violence. Defendant contends he was prevented from demonstrating that events occurring over an extended period of time cumulatively contributed to his belief he needed to act in self-defense at the time of the shooting.

Defendant's contention is based on the exclusion of three types of evidence. The first involved a neighbor's report that he thought he heard gunshots coming from Pamela's house during New Year's. The neighbor never saw who was shooting; nor

was he sure they were shots rather than firecrackers. Defense counsel argued that the prosecutor wanted to hide the fact that Pamela's home was a crank house, that cranksters are violent, have weapons, and shoot weapons. He asserted that if he was not permitted to show that these people were aggressive and violent, the court was taking away defendant's defense. The court excluded the evidence pursuant to section 352.

Exclusion pursuant to section 352 was proper. Evidence that shots, if indeed they were shots, were heard coming from Pamela's house four months prior to the May 13, 1994 crimes, was hardly probative. There was no indication that defendant was aware of the incident. Thus, the incident in no way contributed to defendant's alleged fear.

Recognizing that defendant wanted to present "evidence that Pamela's home was a nest of violence," the court subsequently stated that the admission of such evidence would depend on evidence introduced by defendant. During direct examination, defendant attempted to testify about Michael's drug activities. When defendant sought to disclose events that occurred the weekend before Easter of 1993, the court sustained the prosecutor's objection to the evidence. There was no abuse of discretion by the trial court in ruling that evidence of drug activity more than one year prior to the shooting was irrelevant.

Finally, defendant attempted to testify about three specific instances of violence committed at Pamela's house by Michael's friends:

"[Defense Counsel]: Your Honor, just so I understand the ruling, for the record, my client is not permitted to testify as to any prior pattern of violence at the Albaugh residence when he lived there?

"THE COURT: Say again.

"[Defense Counsel]: My client is not permitted to testify as to any prior pattern of violence that he experienced at the Albaugh residence prior to May 13 of 1994? That's been excluded from this trial? That's my understanding of the ruling?

"THE COURT: Well, there has been no testimony to prior acts.

"[Defense Counsel]: That's why I wanted to recall him, Your Honor.

. . . . . .

"THE COURT: . . . [A]re you speaking of acts of violence against your client?

"[Defense Counsel]: Yes.

"THE COURT: By residents of that house?

"[Defense Counsel]: That's correct, Your Honor. And I hope I have made myself clear for the record, that's what I'm talking about.

"[Prosecutor]: Even if those are to be believed, those occurred four years prior.

"THE COURT: What's your offer of proof on this, Mr. Taranto?

"[Defense Counsel]: There was a situation one time in the garage when he was out there playing darts and people were using methamphetamine and somebody came at him with a broken beer bottle.

"[Prosecutor]: Who and dates?

"THE COURT: Well, just a minute. I want to hear the offer of proof. Someone came out from the garage with a broken beer bottle and attacked your client?

"[Defense Counsel]: Yes, Your Honor. It was in the garage, I believe.

"THE COURT: Who was the individual?

"[Defense Counsel]: Steve Johnson. Dave Johnson.

"THE COURT: Not a party to this case?

"[Defense Counsel]: Not a party to this case.

"THE COURT: All, right. That will be excluded.

"[Defense Counsel]: Okay. There was other evidence of threats being made to him by Michael Goyett. His name has been mentioned. That was the person Mr. Michael Albaugh was snorting methamphetamine with the night before and was watching the Sharks game. That again would go to his state of

mind as to the *Flannel* defense where he may have actually had a belief, in danger, but that belief by the jury could be unreasonable. Okay.

"THE COURT: You speaking of threats made by Michael Albaugh?

"[Defense Counsel]: No, Mike Goyett, one of dear friend [sic] of Michael Albaugh who he was with the night before.

"THE COURT: Again, that would be excluded, not a participant in this particular incident.

"[Defense Counsel]: Finally, Your Honor, the other incident was he was in the garage, again playing darts. There was a couple of Mike's friend[s] in there and couple of people came by on motorcycles and came up, two of Mike's friends, and beat him up right in the garage there. He saw that pattern of violence.

"THE COURT: Again excluded."

Relying on *People* v. *Minifie* (1996) 13 Cal.4th 1055, defendant challenges the exclusion of this evidence on the grounds it was relevant to his self-defense claim. Such reliance is unwarranted.

In *Minifie*, the defendant assaulted Tino, a man who was a friend of Jackie Knight, a man the defendant had previously killed. The defendant claimed self-defense. At trial he attempted to introduce evidence that the Knight family had a reputation for violence, for making threats with the means of carrying them out both in and out of prison, and for being extremely dangerous. After the killing defendant had been threatened both directly and indirectly. He had been threatened and attacked while incarcerated. His wife heard of threats from friends of the Knight family. He was afraid of the Knights finding out where he was. He was scared that he would be killed. On the night of the shooting, the defendant was in town because his close friend had been killed by a friend of the Knights. The defendant knew Tino by sight. He was aware that Tino was a very close friend of Jackie Knight. He knew Tino had a reputation for violence. He was scared of Tino and

associated Tino with the Knight crowd. The trial court excluded the evidence pursuant to sections 1101 and 352 and the defendant was convicted of assault with a deadly weapon among other offenses.

The Supreme Court affirmed the Court of Appeal's decision reversing the defendant's conviction for assault. The court held that "evidence of third party threats is admissible to support a claim of self-defense if there is also evidence from which the jury may find that the defendant reasonably associated the victim with those threats." (*People* v. *Minifie*, *supra*, 13 Cal.4th at p. 1060.) The high court explained that the test "is not whether the victim adopted the third party threats, but whether the defendant reasonably associated the victim with those threats." (*Id.* at p. 1068.)

In this case, defendant fails the test. At best, defendant offered evidence that he had been either threatened or attacked by third parties. However, there was no evidence offered to associate Tom Studer, Pamela Musladin or Michael Albaugh with those threats. Indeed, there was no evidence to explain the motive for the threats. Defendant may not claim self-defense merely because he fears a location, rather then an individual.

Photo Buttons of Victim

Immediately prior to opening statements, defense counsel moved to direct members of the Studer family in the courtroom not to wear display buttons with a photograph of the murder victim Tom Studer:

"[Defense Counsel]: . . . And this is about this matter and I just want to put on the record, Your Honor. This is in all due respect to the Studer family who is present here in the courtroom. [¶] I think it's inappropriate. They are wearing buttons that show a photograph of the decedent. I would like to just say for purposes of the record, Your Honor, this is a jury trial. If it was a court trial, I wouldn't mind. As jurors sit here, they have natural feelings and natural passions. They could be inflamed over the fact that there was a photograph on Ms. Studer's breast or photograph of the decedent on Mr. Studer's

chest or on the brother's chest. I just think it's inappropriate, Your Honor. I would like to have -- they can stay here. There is no problem with that.

"THE COURT: I understand that. The button has nothing except a photograph?

"[Defense Counsel]: That's correct, Your Honor.

"THE COURT: The jury's already been instructed not to let passion to prejudice influence their verdict and they will again be instructed at the close of the case on the same subject. There is no legend on the buttons. I see no possible prejudice to the defendant. The motion to have those removed is denied."

Defendant now contends he was denied his constitutional rights to due process and a fair trial because Tom Studer's family were permitted to wear photo pins of the victim in front of the jury. The issue has never been decided by a California court.

We first note the record is somewhat incomplete. It fails to disclose the size of the buttons, the number of Studer family members wearing the challenged buttons on subsequent days of trial, and whether the jurors could even see and recognize the photo button as depicting the murder victim. Nevertheless, we proceed on the basis of the record before us.

In order for defendant to prevail on his claim of being denied a fair trial he must show either actual or inherent prejudice.[11] (*Holbrook* v. *Flynn* (1986) 475 U.S. 560, 570.) "The test for inherent prejudice is not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play. This test requires us to examine two factors: first, whether there is an impermissible factor coming into play and second, whether it poses an unacceptable risk." (*Woods* v. *Dugger* (11 Cir. 1991) 923 F.2d 1454, 1457, internal quotations and citations omitted.)

In *Norris* v. *Risley* (9th Cir. 1990) 918 F.2d 828, the federal

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[11] There is no claim of actual prejudice by defendant.

court granted habeas relief to an inmate whose state trial for rape and aggravated kidnapping were conducted while spectators wore "Women Against Rape" buttons in front of the jury. The Ninth Circuit found "the buttons' message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence." (*Id.* at p. 831, fn. omitted.)

In contrast to the buttons in *Norris*, the message to be conveyed by the Studer family wearing buttons is less than clear. The simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of family member. While we consider the wearing of photographs of victims in a courtroom to be an "impermissible factor coming into play," the practice of which should be discouraged, we do not believe the buttons in this case branded defendant "with an unmistakable mark of guilt" in the eyes of the jurors. (See *Holbrook* v. *Flynn, supra*, 475 U.S. at pp. 570-571.)

Court Response to Jury Question

On the second day of deliberations, the jury sent the following note to the court: "We need amplification of the following: [¶] 1) The definition of Murder of the first degree contains the phrase 'express malice' -- . . . (a) Does this exclude 'implied' malice?" The trial court refused to answer the question and merely wrote across the jury note, "Refer to the instructions."

Defendant argues the court's response to the jury's question violated Penal Code section 1138,[12] because counsel was not notified of the communication and neither counsel nor defendant were present when the court gave its response. We

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[12] Penal Code section 1138 provides: "After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

find the issue has been waived.

When counsel does not object to the court's failure to provide earlier notice or to the manner in which the court responded to the jury's request, the defense waives the trial court's error in failing to notify counsel and the response given to the jury. (*People* v. *Price* (1991) 1 Cal.4th 324, 414; *People* v. *Jennings* (1991) 53 Cal.3d 334, 383.)

At the hearing on defendant's motion for new trial, defense counsel challenged the trial court's response to the jury question, and commented: "When the defense arrived that day, after being called that the jury had a question, the answer had already been given and the jury had already been sent back to the jury room. The defense was deprived of the chance at that point to discover the issue of the confusion and to ask that it be clearly and simply addressed. That, yes, absolutely you must find express malice for first degree murder." It is apparent from this statement that counsel was aware of the court's communication with the jury, yet failed to object. Accordingly, the issue is waived.

Voir Dire

Defendant contends the trial court erred in refusing to permit defense counsel to question prospective jurors on their attitudes regarding the acquittal of O.J. Simpson which occurred one week before trial. He maintains that the immediate aftermath of the Simpson verdict was the worst possible time to defend a man charged with murder in a domestic violence case. He concludes he should have been permitted to ask questions with sufficient specificity to enable him to utilize his peremptory challenges.

Defendant correctly contends that on voir dire defense counsel should be permitted to ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges. (*People* v. *Wash* (1993) 6 Cal.4th 215, 253.) Nevertheless, the trial court retains considerable discretion to contain voir dire within reasonable limits. (*Ibid.*) "Abuse of discretion is found if the questioning [of jurors] is not

reasonably sufficient to test the jury for bias or partiality." (*People* v. *Chaney* (1991) 234 Cal.App.3d 853, 861.)

Our review of the record indicates the jurors below were questioned about physical assault, domestic abuse, divorce, child custody and publicity about crime. The questions fully covered the information defendant sought with his questions about the *Simpson* case.

Without moving this court to take judicial notice, defendant points to the retrial of the *Menendez* case, and observes that "other courts which began trials at the same time recognized the potential impact of the [Simpson] verdict so clearly that they conducted Simpson-related voir dire, sua sponte."[13] The comparison is pointless. Both the *Simpson* and *Menendez* cases were high-profile trials with extensive media coverage. It was logical to question *Menendez* jurors, who potentially would be subjected to the same media attention, whether this would affect their performance as jurors. No such rationale was present in the case at bench. The court did not abuse its discretion.

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[13] According to defendant, the judge in the *Menendez* case asked the jury: "As you're most likely aware, the case of *People* v. *Simpson* has been concluded and a verdict was reached in that case and it received quite a bit of coverage in the news media, and my first question to you as a group is -- to some extent this was covered in the questionnaire we gave you . . . [b]ut going beyond that now to the result of that case . . . do any of you feel that that result and the way it's been reported and commented on by the media and the public in general, whether that will have any impact on you as you perform your role as a juror in this particular case?"

DISPOSITION

The judgment is affirmed.

_____
Mihara, J.

WE CONCUR:

_____
Elia, Acting P.J.

_____
Wunderlich, J.

People v. Musladin
H015159

Filed 3/25/98

Sixth Appellate District No. H015159

S067385

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent,

v.

MATHEW GUY MUSLADIN, Appellant.

Appellant's petition for review DENIED.

s/_____
Chief Justice

Filed 1/6/98

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,	**H015159**
Plaintiff and Respondent,	
	(Super. Ct. No. 177400)
v.	**Santa Clara County**
MATHEW GUY MUSLADIN,	
Defendant and Appellant.	

BY THE COURT*:

Appellant's petition for rehearing is denied.

Dated: JAN 6 – 1998 WUNDERLICH, J. Acting P.J.

*Before Wunderlich, Acting P.J., and Mihara, J.

Filed 6/2/00

S079768

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

IN RE MATTHEW GUY MUSLADIN

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

s/_____
Chief Justice

(1)

NO. 05-785

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS L. CAREY, WARDEN
Petitioner,

v.

MATHEW G. MUSLADIN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 05-785

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS L. CAREY, WARDEN
Petitioner,

v.

MATHEW G. MUSLADIN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, Mathew G. Musladin, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Ninth Circuit in this case. That opinion is reported at 427 F.3d 653 (2005).

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Under 28 U.S.C. § 2254(d)(1), may a federal court consider decisions of courts other than this Court in deciding whether a state-court decision is contrary to or an unreasonable application of this Court's precedents?

COUNTERSTATEMENT OF THE CASE

A. Statement of Facts

On May 19, 1994, Tom Studer was shot and killed. Nearly eighteen months later Mathew Musladin was tried for the murder of Studer. Musladin did not deny the shooting. His claim was self-defense. Thus, the only issue for the jury to resolve was whether he shot Studer out of an honest belief in the need for self-defense (as he testified) or out of a premeditated intent to kill (as the prosecutor theorized). If the jury found that Musladin honestly believed in the need for self-defense, the homicide could be no more than manslaughter.

Studer had been shot in the back of the right shoulder and in the head. The forensic evidence determined that both shots were fired at a distance; there were no powder burns. All experts, both prosecution and defense, agreed that the fatal injury, the wound to the head, was the result of a ricochet.

Immediately prior to opening statements, defense counsel motioned the court to preclude Studer's family from wearing buttons with Studer's photograph

on them as they had been doing each day up to that point. The trial court denied this motion. The Studer family sat in the front row, immediately behind the prosecutor, in plain view of and adjacent to the jurors. The buttons were several inches in diameter. At least three members of Studer's family were present every day of the trial wearing the buttons.

On November 1, 1995, Musladin was convicted of all counts – first-degree murder, attempted murder, first-degree burglary and assault with a firearm.

B. Course of Proceedings in State Court

In 1998, the California Court of Appeal affirmed the judgment rejecting respondent's claim that the display of the buttons had deprived him of a fair trial. In 1999, Respondent filed a petition for writ of habeas corpus in the California Supreme Court. The petition was denied without comment in 2000.

C. Course of Proceedings in District Court

On June 5, 2000, respondent filed a Petition for Writ of Habeas Corpus. The district court issued an Order to Show Cause on October 19, 2000, and the state filed an Answer on May 14, 2001. On August 16, 2001, respondent filed a Traverse.[1] On May 14, 2003, the district court denied the Petition for Writ of

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[1]The Office of the Federal Public Defender was appointed to represent respondent before the filing of the traverse.

Habeas Corpus in its entirety.

On June 12, 2003, respondent filed a Notice of Appeal and a Motion for Certificate of Appealability. On September 2, 2003, the district court granted respondent's Motion for a Certificate of Appealability as to all but one claim.

On April 8, 2005, the Ninth Circuit reversed. It held that respondent's right to a fair trial was prejudiced when the trial court allowed Studer's family to wear during the trial buttons emblazoned with a picture of Studer.[2] The panel majority accepted the state court's finding that the wearing of photographs of victims in a courtroom is an impermissible factor that should be discouraged. The majority found that the state court then improperly required respondent to prove that the buttons had branded him with an "unmistakable mark of guilt." *Id.* at 1076-79.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to grant *certiorari* to address a decision of a court that breaks no new ground in the interpretation or application of 28 U.S.C. § 2254(d)(1) and does not conflict with any relevant decision of this Court. Contrary to Petitioner's arguments, certiorari review is unwarranted in this case.

Petitioner's contention that the panel improperly elevated circuit precedent

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[2]The panel was divided. Senior Circuit Judge David Thompson dissented, finding that the state court's decision was not contrary to or an unreasonable application of established Supreme Court law. *Musladin v. Lamarque*, 427 F.3d 653, 661 (9th Cir. 2005).

to "clearly established law" for purposes of applying § 2254(d)(1), misreads the decision. The relevant rule that was applied was taken directly from this Court's holdings in *Williams* and *Flynn*. Further, the assertion that there is a circuit split on the relevance of lower court opinions in the §2254(d)(1) analysis is a fiction. The panel's consideration of *Norris v. Risley*, 918 F.2d 828 (1990), in its analysis is completely consistent with how other circuit courts apply §2254(d)(1).[3]

Petitioner also accuses the panel majority of engaging in a selective parsing of the state court opinion in order to discern an incorrect legal standard. In fact, the state court opinion is completely clear on the legal standard it was applying when ruling on the claim of error, and the panel correctly found that standard to be contrary to this Court's precedent.

Lastly, Petitioner for the first time in this case raises an argument about prejudice that is taken largely from the dissent to the denial of rehearing authored by Judge Bea. The failure to make this argument below waives it. Further, Judge Bea, as well as Petitioner, misreads *Williams* and *Flynn* on the issue of prejudice. Because the Ninth Circuit's application of §2254(d)(1) was correct and consistent

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[3]Indeed, in Petitioner's rehearing petition below, Petitioner conceded the relevance of *Norris* in the application of § 2254(d)(1). Appellee's Petition for Rehearing at 11 ("we acknowledge that the decisions of circuit and state courts may help to determine what law has been 'clearly established' by the Supreme Court and the reasonableness of a particular application of that law."), ("Circuit and state authority are relevant only to the extent they help evaluate what is clearly established and reasonable under Supreme Court law.")

with this Court's decisions, and its decision neither creates nor reflects a circuit split, there is no reason for the Court to grant certiorari in this case.

1. There is No Genuine Conflict Between Decisions as the Decisions of this Court and of the Circuits are in Almost Complete Agreement

Petitioner argues that the Court should grant review to resolve an "inconsistency" in circuit authority about the proper use of lower federal court authority under 28 U.S.C. § 2254(d)(1).[4] *Petition* at 12-13. Specifically, petitioner claims that "[c]ircuit decisions are not entirely consistent" on the issue of whether a federal appellate court, on habeas review, may consider federal appellate court decisions at all in determining whether a state-court decision is contrary to or an unreasonable application of clearly established Supreme Court law. *Petition* at 12. Petitioner overstates any discrepancy that may exist among the circuits, and the authorities it cites largely do not support its argument.

Petitioner fails to appreciate the distinction between what is "clearly established Federal law" as established by this Court's decisions under §2254

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[4]Petitioner and the judges disagreeing with the decision below have not agreed about the existence or extent of any circuit split. The dissent fails to note any circuit split. *Musladin*, 427 F.3d at 661-63 (Thompson, J., dissenting). Petitioner characterizes it as an "inconsistency." *Petition* at 13. One dissent from the denial of rehearing en banc takes the most extreme view: the majority's decision "sharpened a serious circuit split." *Musladin v. Lamarque*, 427 F.3d 647, 650-51 (9th Cir. 2005) (Kleinfeld, J., dissenting from denial of rehearing en banc).

(d)(1) and what authorities a lower court may consider in deciding whether a state-court decision is contrary to or an unreasonable application of that law. This distinction is honored, correctly, in the decision below and by every circuit. No circuit, including the Ninth Circuit, allows the writ to be granted based on "clearly established Federal law" as established by circuit court decisions. *See, e.g.*, *Musladin*, 427 F.3d at 655 ("AEDPA limits the source of clearly-established federal law to Supreme Court cases."); *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 2000) (rejecting petitioner's argument that district court erred by "ignoring this court's previous jurisprudence and by relying solely on Supreme Court precedent" in adjudicating his petition under § 2254(d)(1)); after AEDPA, Ninth Circuit "can no longer reverse a state court decision merely because that decision conflicts with Ninth Circuit precedent on a federal Constitutional issue."). Nor does any circuit prohibit the use of lower-court decisions in applying § 2254(d)(1). On the contrary, every circuit, either in practice or by explicit holding, allows federal appellate decisions to be considered.

Petitioner describes the alleged inconsistency amongst the circuit courts as follows. *Petition* at 12-13. On one side are *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002), *Matteo v. Superintendent*, 171 F.3d 877 (3d Cir. 1999), *Williams v. Bowersox*, 340 F.3d 667 (8th Cir. 2003), and the decision below, all of which are

circuit court decisions that use federal appellate decisions in determining "whether a given application of Supreme Court authority is reasonable." *Petition* at 12. In *Ouber*, the First Circuit acknowledged AEDPA's requirement that "the relevant legal rule be clearly established in a Supreme Court holding, rather than in dictum or in holdings of lower federal courts." 293 F.3d at 26.

> This does not mean, however, that other federal court decisions are wholly irrelevant to the reasonableness determination. "To the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness vel non of the state court's treatment of the contested issue." *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998). Reference to such cases may be especially helpful when the governing Supreme Court precedent articulates a broad principles that applies to a wide variety of factual patterns.

Id.

The *Ouber* Court, faced with a habeas claim of ineffective assistance of counsel, held that in applying the principles of *Strickland* to a particular case,

> it is helpful to examine precedents from lower federal courts to determine how the general standard applies to a particular set of facts. Although such decisions are not themselves binding on a state court under the AEDPA framework, . . . resort to them is appropriate for the purpose of discerning the requirements of *Strickland* in factually similar cases.

Id. at 26-27 (citations omitted)

In *Matteo*, the Third Circuit, sitting en banc, considered the role of federal appellate court decisions in applying § 2254(d)(1)'s standard of review:

> [W]e do not believe federal habeas courts are precluded from considering the decisions of the inferior federal courts when evaluating whether the state court's application of the law was reasonable. . . . Instead, the primary significance of the phrase "as determined by the Supreme Court of the United States" is that federal courts may not grant habeas corpus relief based on the state court's failure to adhere to the precedent of a lower federal court on an issue that the Supreme Court has not addressed. Thus, in certain cases it may be appropriate to consider the decisions of inferior federal courts as helpful amplifications of Supreme Court precedent.

Id. at 890. The Third Circuit, like the First Circuit in *Ouber*, held that a circuit court may consider its own and other appellate court decisions in deciding whether a state court reasonably applied Supreme Court precedent, particularly when deciding whether a given state-court decision was a reasonable application of a broadly stated Supreme Court rule.

Similarly, the Eighth Circuit in *Williams* concluded that while federal appellate decisions "do not, of course, make a legal principle 'clearly established for the purposes of § 2254(d)(1) because they do not issue from the Supreme Court, nonetheless, they provide significant insight into what constitutes reasonableness for a particular fact pattern.'" *Williams v. Bowersox*, 340 F.3d

667, 671 (8th Cir. 2003) (quoting *Phoenix v. Matesanz*, 233 F.3d 77, 83 n.3 (1st Cir. 2000)).

To establish the other side of the "circuit split," petitioner cites three cases -- from the Sixth, Fourth and Seventh circuits -- as reaching a contrary conclusion about the appropriate use of federal appellate court cases in the § 2254(d)(1) analysis.[5] Petitioner draws the wrong conclusion from these cases. A close reading of the cases, and a review of other cases from these circuits, reveals that their holdings are consistent with the holdings of the First, Third, Eighth and Ninth circuits.

In *Bell v. Jarvis*, 236 F.3d 149, 158 (4th Cir. 2000) (en banc), the Fourth Circuit discussed its reliance on appellate court decisions to assess the objective reasonableness of the state-court decision before it. "[W]e are satisfied that *Williams* [*v. Taylor*, 529 U.S. 362 (2000)] does not act as an absolute prohibition against our use . . . of circuit precedent." *Id.* at 174 n.17.

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[5]One dissent also cited a Tenth Circuit case, *Welch v. City of Pratt*, 214 F.3d 1219 (10th Cir. 2000). *Musladin*, 427 F.3d at 650 & n.18 (Kleinfeld, J., dissenting from denial of petition for rehearing en banc). The passage the dissent cites from *Welch* is non-controversial; it merely reaffirms the fundamental principle that, under § 2254(d)(1), federal appellate decisions are not "clearly established law." It says nothing about the issue here: whether a circuit court may consider lower federal court decisions in assessing the reasonableness of a state court decision. In fact, the Tenth Circuit in *Welch* cited several federal appellate cases in deciding whether the challenged jury instructions satisfied the Supreme Court's constitutional requirements. 214 F.3d at 1221-22. *Welch* does not support petitioner's argument that there is a circuit split.

> [T]he *Williams* decision did not suggest or command that this court make the reasonableness determination in a vacuum. . . . Where the otherwise objectively reasonable bases for a state court's interpretation of a given precedent are common to the reasoned decision of many courts, it would be judicial myopia of the first order to ignore the force of consensus in assessing the objective reasonableness in the particular case.

Id. (internal brackets, quotation marks, citation and ellipses omitted)

The Seventh Circuit case petitioner cites, *Bocian v. Godinez*, 101 F.3d 465 (7th Cir. 1996), pre-dates this Court's interpretation of § 2254(d)(1) in *Williams*. As such, it is of dubious value. In subsequent cases, the Seventh Circuit has considered federal appellate decisions in deciding whether a state-court decision was contrary to or an unreasonable application of Supreme Court precedent. *See, e.g.*, *Easley v. Frey*, 433 F.3d 969, 972-74 (7th Cir. 2006) (discussing circuit-court decisions interpreting Supreme Court decisions and citing approvingly decisions of three circuits in deciding whether state court reasonably applied this Court's law regarding interrogations); *Burt v. Uchtman*, 422 F.3d 557, 564-70 (7th Cir. 2005) (considering Seventh Circuit cases in deciding whether trial court should have ordered competency hearing before accepting plea and whether attorney was ineffective for failing to request competency examination); *Jackson v. Frank*, 348 F.3d 658, 665 (7th Cir. 2003) (considering other circuits' decisions about whether

misstatement of law renders *Miranda* waiver involuntary: "Although the only definitive source of clearly established federal law under the AEDPA is Supreme Court authority . . . the determination by one of our sister circuits that a misstatement of state law alone does not vitiate a *Miranda* waiver certainly makes it more difficult to conclude that the [state court] unreasonably applied Supreme Court authority."); *Searcy v. Jaimet*, 332 F.3d 1081, 1901-91 (7th Cir. 2003) (considering federal appellate cases in deciding whether trial court restrictions on cross-examination were permissible).

Although the Sixth Circuit has stated that it may not consider its own decisions in determining whether a state-court decision is contrary to or an unreasonable application of clearly established federal law,[6] it has not excluded appellate decisions from the § 2254(d)(1) review process. The Sixth Circuit has held that circuit-court decisions may -- or must -- be considered in determining what is clearly established law under § 2254(d)(1).

> First, "the decisions of the United States Court of Appeals may be informative to the extent we have already reviewed and interpreted the relevant Supreme Court case law to determine whether a legal principle or right had been clearly established by the Supreme Court." We are also bound by any prior Sixth Circuit

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[6]*See, e.g., Arnett v. Jackson*, 393 F.3d 681, 688 (6th Cir. 2005); *Mizel v. Tate*, 267 F.3d 524, 531 (6th Cir. 2001).

> decisions concluding that federal law on a particular issue has been "clearly established" by certain holdings of the Supreme Court.

Smith v. Stegall, 385 F.3d 993, 998 (6th Cir. 2004) (citations omitted). In practice, the Sixth Circuit in *Smith* considered federal appellate decisions in addressing an issue not considered by this Court in *Santobello v. New York*, 404 U.S. 257 (1975): what constitutes a breach of a plea agreement. *Id.* at 999-1001. The court also concluded that the state court's decision was not unreasonable at least in part because the Sixth Circuit followed the same approach in interpreting plea agreements. *Id.* at 1001.

Decisions from the other three circuits are consistent with this approach: They do not rely on circuit-court decisions to state what is clearly established law but they consider these decisions in assessing the state courts' application of clearly established law. *See, e.g.*, *Coleman v. Dretke*, 395 F.3d 216, 222, 224 & nn. 26 and 34 (5th Cir. 2004) (considering other circuits' application of Supreme Court case to facts similar to those in habeas case and in discussing whether clearly established law requires conclusion that sex-offender treatment shocks the conscience); *Cotto v. Herbert*, 331 F.3d 217, 250 (2d Cir. 2003) ("Although our task is to determine whether the state courts reasonably applied clearly established Supreme Court law, we think it appropriate to make some examination of how the

federal courts of appeals have analyzed the issue." (quotation marks omitted)); *Hawkins v. Alabama*, 318 F.3d 1302, 1309 (11th Cir. 2003) (although federal appellate decisions are not clearly established federal law, they "are helpful to the AEDPA inquiry only to the extent that the decisions demonstrate that the Supreme Court's pre-existing law compelled lower courts to decide in a definite way the case before them.").

Indeed, this Court has cited the decisions of federal appellate courts in applying § 2254(d)(1). In *Price v. Vincent*, 538 U.S. 634, 643 n.2 (2003), the Court noted decisions from "numerous other courts [that] refused to find double jeopardy violations under similar circumstances" to support its conclusion that the state-court decision was reasonable. And in *Kane v. Espitia*, 126 S. Ct. 407 (2005), the Court cited the circuit split about whether *Faretta* implies a right to law-library access to support its conclusion that the right was not clearly established by *Faretta*.

The Ninth Circuit's use of its own precedent, in this case and in others, is consistent with the use of circuit precedent in this Court and all the other circuits.

> AEDPA limits the source of clearly-established federal law to Supreme Court cases. Nevertheless, we recognize that precedent from this court, or any other federal circuit court, has persuasive value in our effort to determine "whether a particular state court decision is an

'unreasonable application' of Supreme Court law,
and. . .what law is 'clearly established.' "

Musladin, 427 F.3d at 655 (quoting *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000) (ellipses in original)). Its use of *Norris* in this case did not create, further or even contribute to a circuit split. All the circuits agree that lower court decisional authority has a limited but appropriate role in determining whether a state court has reasonably applied clearly established Supreme Court precedent. Because there is little dissension and no genuine conflict among the circuits, granting a writ of certiorari in this case is not necessary to secure uniformity of decision.[7]

2. The Decision Below Did Not Break New Ground in the Interpretation or Application of § 2254(d)(1), and it Did Not Conflict With Any Decision of this Court

The Ninth Circuit in this case properly applied the standard of review set forth in 28 U.S.C. § 2254(d)(1). After determining the applicable rule from this

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[7] *See Powell v. Nevada*, 511 U.S. 79, 86-87 (1994) (discussing importance of denying certiorari except in cases "where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal") (Thomas, J. (with Rehnquist, C.J.,) dissenting); *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting from denial of certiorari) (noting that Court frequently denies cert. review even where there is undeniable circuit split "because the conflict is 'tolerable' or 'narrow,' or because other courts of appeal should have the opportunity to weigh in on one side or another of the unsettled issue, or for some other unstated reason."); *Layne & Bowler Corp. v. Western Well Work, Inc.*, 261 U.S. 387, 392093 (1923) (dismissing cert. as improvidently granted; Court granted cert. because of claimed circuit split, but upon review circuits "were really in harmony and not in conflict and . . . there was no ground for our allowing the writ of certiorari to add to an already burdened docket.").

Court's cases, it concluded that the state appellate court decision was both contrary to and an unreasonable application of that rule. The Ninth Circuit's application of § 2254(d)(1) followed this Court's interpretation of the statute in *Williams v. Taylor*. Neither the process it followed nor its result conflicts with any decision of this Court. There is no good reason for the Court to grant certiorari to review this case.

a. What the Ninth Circuit Did in This Case

To apply § 2254(d)(1), a federal court on habeas review must first identify the clearly established Supreme Court law. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Bell v. Cone*, 535 U.S. 685, 695-97 (2002); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). Then it must determine whether the state-court decision was "contrary to" or an "unreasonable application of" that law. 28 U.S.C. § 2254(d)(1). That is what the court below did in this case.

The Ninth Circuit identified the "clearly established Federal law" by relying on two cases from this Court, *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986). *Musladin* 427 F.3d 653, at 656-57. From these cases, the court derived the rule to be applied to respondent's claim: "[C]ertain practices attendant to the conduct of a trial can create such an 'unacceptable risk of impermissible factors coming into play,' as to be 'inherently

prejudicial' to a criminal defendant." *Id.* at 656 (citing *Williams* and *Flynn*). It then discussed the facts of these two cases and their application of the rule. *Id.* at 656-57. The Ninth Circuit also discussed its own prior case, *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), as a tool for "assess[ing] . . . the meaning of the federal law that was clearly established by *Williams* and *Flynn* and whether the state court's application of that law in the case before [it was] objectively unreasonable." *Id.* at 657.

The court below compared the rule of *Williams* and *Flynn* to the rule applied by the state court in respondent's case. *Id.* at 658. The state court's decision was contrary to the rule of *Williams* and *Flynn*, the Ninth Circuit held, because it

> required that the challenged practice not only constitute an unacceptable risk of an impermissible factor coming into play but also that it "brand" the defendant with an "unmistakable mark of guilt." This additional test imposes too high and too unreasonable a burden on defendants and is contrary to established Supreme Court law.

Id. at 659; *see Williams*, 529 U.S. at 393-99 (finding state-court decision contrary to Supreme Court precedent because it required petitioner to make additional showing beyond what Supreme Court rule required). The Ninth Circuit then discussed this Court's use of the phrase "branding with an unmistakable mark of

guilt" in *Williams* and *Flynn* to show that it was not part of the Court's rule and should not have been a part of the test applied by the state court to respondent's claim. *Id.* at 659-60 & n. 2.

Finally, using *Norris* for comparison, the Ninth Circuit concluded that the state court unreasonably assessed the prejudice respondent suffered from the buttons in light of the particular facts of his case. *Id.* at 660. It concluded that the message conveyed by the spectator buttons in this case was stronger, more prejudicial, more direct and clear that the anti-rape message on the buttons in *Norris*. *Id.* In light of "the specific message that the button conveys in light of the particular facts and issues before the jury," the Ninth Circuit concluded that "a reasonable jurist would be compelled to conclude that the buttons worn by Studer's family members conveyed the message that the defendant was guilty." *Id.* at 661.

The Ninth Circuit thus held that the California court of appeal decision was both contrary to and an unreasonable application of this Court's precedents. *Id.* It held that the state court unreasonably applied a rule contrary to the rule set forth in *Flynn* when, despite its finding that the buttons were an "impermissible factor," it denied relief because the buttons did not brand respondent with "an unmistakable mark of guilt." *Id.*

b. The Ninth Circuit Decision Was Consistent With § 2254(d)(1) and This Court's Precedents

Petitioner apparently does not dispute the substance of the rule the Ninth Circuit applied in this case, nor does it dispute that the rule is clearly established Supreme Court authority. *See Petition* at 8-9 ("The relevant inquiry is whether the challenged courtroom practice 'was so inherently prejudicial that [the defendant] was thereby denied his constitutional right to a fair trial.'" (quoting *Flynn*, 475 U.S. at 570)); *see also id.* at 14 ("the state court set forth the correct standard for evaluating Musladin's claim, and identified the most closely applicable cases of this Court . . . .").[8] There is no dispute that the rule from *Williams*, decided in 1976, and *Flynn*, decided in 1986, was clearly established Supreme Court precedent at the time of respondent's 1995 trial and subsequent appeal.

Petitioner claims, however, that the court below relied on its own precedent "*qua* established Supreme Court law", and standing alone, to "dictate that a given state court decision was an unreasonable application of Supreme Court authority under 2254(d)(1)." *Petition* at 13. It also claims that the court violated *Woodford v. Visciotti* by "selectively pars[ing] the state-court opinion to tease out what it

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[8]This is substantially the same rule that the state appellate court applied. *See Petition* Appendix 74a ("The test for inherent prejudice is . . . whether an unacceptable risk is presented of impermissible factors coming into play.").

mistakenly characterized as an incorrect standard employed by the state court." *Id.* at 8. Finally, Petitioner argues that the Ninth Circuit violated *Deck v. Missouri* by "concluding that a finding of inherent prejudice requires reversal without further inquiry." *Id.*

As discussed below, the Ninth Circuit's decision correctly applied § 2254(d)(1). It was consistent with this Court's decisions interpreting the statute and with *Deck*. Petitioner's opinion that the court reached the wrong result, even if correct, would not warrant the granting of certiorari in this case. *See* Supreme Court Rule 10 (certiorari is "rarely granted when the asserted error consists of . . . the misapplication of a properly state rule of law.").

i. The Ninth Circuit Properly Considered *Norris* in Applying § 2254(d)(1)

The Ninth Circuit did not grant relief in this case based on its own precedent. In fact, its primary holding -- that the state-court decision was contrary to Supreme Court precedent because it required a showing that *Williams* and *Flynn* did not -- was based solely on *Williams* and *Flynn*; the only reference to *Norris* was in a footnote. *Musladin*, 427 F.3d at 658-60 & n.1.

As an alternative basis for granting the writ, the Ninth Circuit held that the state court's application of the clearly established Supreme Court rule was

objectively unreasonable. In reaching this conclusion, the Ninth Circuit did consider *Norris*, its own prior case, that applied the same rule and was factually very similar to respondent's claim. The Ninth Circuit's reference to *Norris* in the circumstances of this case was not contrary to § 2254(d)(1) or this Court's cases.

The "persuasive weight" the Ninth Circuit said it was giving *Norris* is far from the controlling weight that Petitioner and the dissenting judges ascribe to it. An authority given "persuasive weight" is not controlling; rather, it

> constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 499-500 (1958) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)) (describing persuasive weight given to interpretation of statute by agency charged with administering statute).[9]

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[9]*See also Sanford's Estate v. Commissioner of Internal Revenue*, 308 U.S. 39, 52 (1939) ("Administrative practice may be of persuasive weight in determining the construction of a statute of doubtful meaning where the practice does not conflict with other provisions of the statute and is not so inconsistent with the applicable decisions of the court as to produce inconsistency and confusion in the administration of the law. . . . But courts are not bound to accept the administrative construction of a statute regardless of consequences, even when disclosed in the form of rulings."); *Wallace v. Christensen*, 802 F.2d 1539, 1559 (Kozinski, J., concurring) (discussing decision by then-judge Scalia contrasting the "'authoritative, as opposed to the persuasive weight'" of legislative history); *California Hosp. Ass'n v. Henning*, 770 F.2d

Nothing in § 2254(d)(1) or in this Court's decisions interpreting it prevents a federal appellate court from considering, as non-binding authority, lower court decisions for the purpose of deciding whether a state-court decision was contrary to or an unreasonable application of Supreme Court precedent. Indeed, this Court, in assessing whether a state court's conclusion about whether jeopardy was terminated was an objectively reasonable application of clearly established Supreme Court law, cited decisions from "numerous other courts [that] refused to find double jeopardy violations under similar circumstances." *Price v. Vincent*, 538 U.S. 634, 643 n.2 (2003); *see also Kane v. Espitia*, 126 S. Ct. 407 (2005) (citing circuit split about whether *Faretta* implies right to law-library access to support conclusion that *Faretta* did not clearly establish right).

This Court reversed the Ninth Circuit in *Kane v. Espitia*, 126 S. Ct. 407 (2005), because the court in that case granted habeas relief based solely on its own precedent. In that case, the Ninth Circuit admitted that its decision was based not on a rule of law clearly established by this Court's decisions but solely on its own precedent. The court in that case acknowledged that decisions from other circuits were to the contrary but concluded that it was bound by its own prior decisions.

856, 859 (9th Cir. 1985) (although regulation embodying agency's interpretation of statute carries persuasive weight, courts must decide whether regulation is a "reasonable and permissive construction of the statute").

Espitia v. Ortiz, 113 Fed. Appx. 802, 804-05 (9th Cir. 2004), *reversed by Kane v. Espitia*, 126 S. Ct. 407 (2005). Noting that *Faretta* was the only Supreme Court case identified as a source for the claimed right and noting the circuit split about whether *Faretta* in fact implies such a right, this Court concluded that the circuit court had "erred in holding, based on *Faretta*, that a violation of a law library access right is a basis for federal habeas relief." *Id.*

In this case, by contrast, and as petitioner acknowledges, the Ninth Circuit relied on the rule clearly established by this Court in *Williams* and *Flynn*. *See Petition* at 5-6 ("the Ninth Circuit held the state court's rejection of constitutional error in allowing the spectator's buttons was an unreasonable application of *Estelle v. Williams*, 425 U.S. 501, and *Holbrook v. Flynn*, 475 U.S. 560. . . . The Ninth Circuit additionally found that the state court unreasonably applied *Estelle* and *Flynn*"). As discussed above, although the Ninth Circuit considered its prior decision in *Norris*, it did not rely on it as "clearly established law" under § 2254(d)(1) or find the state-court decision objectively unreasonable based solely on it. In short, while the panel in *Espitia* considered itself bound by its prior precedent and applied that authority, instead of this Court's case law, in granting relief, the Ninth Circuit below correctly applied § 2254(d)(1), identified and relied on the applicable Supreme Court precedents and weighed its own precedent only

in deciding whether the state-court application was reasonable.

Petitioner and the judges dissenting from the denial of rehearing en banc would prohibit the lower federal courts from citing any non-Supreme Court decision for purposes of the § 2254(d)(1) analysis. *See Musladin*, 427 F.3d at 648 ("The only question for us is whether there is any Supreme Court authority that holds that silent signals of affiliation by spectators in a courtroom deny a defendant due process by eroding his presumption of innocence. The answer is that there is no such case. That should be the end of our inquiry.") (Kleinfeld, J., dissenting from denial of rehearing en banc); *Petition* at i (Question Presented calls for certiorari review because Ninth Circuit exceeded its authority under §2254(d(1) by granting habeas relief "[i]n the absence of controlling Supreme Court law.")

In this case, in particular, the Ninth Circuit could not have decided the reasonableness of the state-court decision without discussing *Norris* because the state court itself relied heavily on *Norris* in addressing respondent's claim. *See Petition* Appendix at 74a-75a. On habeas review, a federal court must ensure that "neither the reasoning nor the result of the state-court decision" is contrary to this Court's cases. *Early v. Packer*, 537 U.S. 3, 8 (2002). If the Ninth Circuit were barred from considering *Norris* in this case, it would have had to either ignore the

state court's reasoning or fashion an alternative basis for the state court's decision. The Ninth Circuit could not have assessed the state court's reasoning without discussing the legal basis for its reasoning.

In sum, the Ninth Circuit's use of *Norris* in deciding whether the state court reasonably applied *Williams* and *Flynn* to the facts of respondent's claim was entirely consistent with § 2254(d)(1) and this Court's decisions. Petitioner's arguments rest on mischaracterizations of the decision below and an overly cramped reading of § 2254(d)(1) that this Court has rejected. There is no reason for the Court to grant certiorari in this case.

ii. The Decision Does Not Announce Any Rule Applicable to this Case

Petitioner argues that the court below violated *Woodford v. Visciotti* by "selectively pars[ing] the state-court opinion to tease out what it mistakenly characterized as an incorrect standard employed by the state court." *Petition* at 8. *Visciotti* was a very fact-specific case. The errors this Court identified in the lower court's application of § 2254(d)(1) were grounded in the facts of the state-court decision. *Woodford v. Visciotti*, 537 U.S. 19, 22-26 (2002). It did not set forth any rule applicable to this case that the Ninth Circuit violated.

In *Visciotti*, a capital case, the Court chastised the Ninth Circuit for

concluding that the California Supreme Court applied the wrong standard to petitioner's *Strickland* claim because it occasionally dropped the modifier "reasonably." *Id.* at 23-24. It noted that the state court had repeatedly stated the standard correctly and that it had, itself, occasionally stated the standard as the state court had. *Id.* This Court held that the Ninth Circuit had overlooked the state court's correct statement and application of the law and reversed its grant of the writ. *Id.* at 25.

In this case, by contrast, there is no dispute that the state court correctly recited the applicable Supreme Court standard: "The test for inherent prejudice is ... whether an unacceptable risk is presented of impermissible factors coming into play." *Petition* Appendix 74a. Where it went wrong, however, was in failing to follow the rule it stated.

As the Ninth Circuit correctly held, when the state court required branding after it already had found inherent prejudice, it applied a rule that was contrary to this Court's rule in *Williams* and *Flynn*. *Musladin*, 427 F.3d at 658-59. The Ninth Circuit's recognition of this error was in no way contrary to *Visciotti*. Petitioner's disagreement with the Ninth Circuit's conclusion is not a basis for this Court to grant certiorari.

3. Petitioner's Harmless-Error Argument is Waived and Incorrect

Petitioner argues that this Court should grant certiorari because the Ninth Circuit erred when, after it found constitutional error under *Flynn* and *Williams*, it treated the error as structural instead of considering whether it had a substantial and injurious effect or influence on the jury under *Brecht v. Abrahamson*, 328 U.S. 619 (1993). *Petition* at 15-16. Petitioner waived this argument by not raising it in the court below. Moreover, petitioner is wrong; there is no indication that the Ninth Circuit treated this error as structural.

This Court should not grant certiorari to address Petitioner's claim that the Ninth Circuit's decision conflicts with *Deck* because Petitioner waived this argument. *See Petition* at 15-16. Petitioner did not raise any argument about harmless error in the courts below. Petitioner did not argue in the district court or the Ninth Circuit that even if respondent established a constitutional violation from the spectator buttons, he would be entitled to relief only if the violation had a substantial and injurious effect or influence on the verdict. Even after the Ninth Circuit granted relief, petitioner did not, in its rehearing petition, argue, as it does here, that the court erroneously treated the constitutional violation as structural error. Petitioner has waived this argument.

"Like other defenses to habeas corpus relief, the 'harmless error' obstacle does not arise until the state asserts it; the state's failure to do so in a timely and unequivocal fashion waives the defense." Randy Hertz and James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 31.2(a) (4th ed. 2001); *see, e.g.*, *Saldano v. Roach*, 363 F.3d 545, 554 (5th Cir. 2004) (noting that district court's finding that state waived harmless error argument was not inconsistent with Supreme Court precedent); *Cook v. McKune*, 323 F.3d 825, 840 n.9 (10th Cir. 2003) (granting writ because state did not argue error was harmless and declining to address harmlessness absent briefing by parties or consideration by district court); *Lam v. Kelchner*, 304 F.3d 256, 269 (3d Cir. 2002) (finding that state waived harmless-error argument by failing to raise it in district court); *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990) (concluding that state waived harmless-error argument by failing to raise it in opening brief); *see also Trest v. Cain*, 522 U.S. 87, 89 (1997) (holding that state may waive procedural-default defense by not raising it); *cf.* 28 U.S.C. § 2254(b)(3) (under AEDPA, state does not waive exhaustion requirement unless it does so explicitly).

This Court generally will not address issues that were not raised, briefed or resolved in the lower federal courts. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001); *Glover v. United States*, 531 U.S. 198, 205 (2001); *United States v.*

Alvarez-Sanchez, 511 U.S. 350, 360 n.5 (1994); *Schiro v. Farley*, 510 U.S. 222, 228 (1994). This is particularly true when the claim is complex and has broad implications. *Baldwin v. Reese*, 541 U.S. 27, 34 (2004). This Court is "reluctan[t] to adopt rules that allow a party to withhold raising a defense until after the 'main event' – in this case, the proceeding in the District Court – is over." *Granberry v. Greer*, 481 U.S. 129, 132 (1987) (holding that court may address merits of claim if state does not argue non-exhaustion); *see also Amadeo v. Zant*, 486 U.S. 214, 228 n.6 (1988) (finding state's argument about prejudice waived because state failed to dispute prejudice in lower federal courts; "Having conceded this point in both courts below, respondent will not be heard to dispute it here.").

Because petitioner did not raise this argument below, the parties did not brief it and the courts below did not address it. Respondent established a constitutional violation by showing that the spectator buttons, in the context of his trial, were inherently prejudicial; as Petitioner acknowledges, he did not rely on a theory of actual prejudice, and he did not need to show actual prejudice. *Petition* at 15; *see Deck*, 125 S. Ct. at 2015 ("where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation."); *see also Holbrook v. Flynn*, 475 U.S. 560, 572 (1986) (holding that defendant who

challenges courtroom procedure can establish constitutional violation either by showing that it was inherently prejudicial or that it was actually prejudicial); *see also* Brief of Appellee at 28 n.24 (emphasis in original) *see also* "Appellee's Petition for Rehearing" at 4 n.2 ("There is no claim of actual prejudice by defendant."). To determine whether a constitutional violation is harmless under *Brecht*, a court must decide whether the error "resulted in 'actual prejudice.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). No court below has done that in this case. This Court should not grant certiorari to address this argument that Petitioner failed to raise in the courts below.

That being said, the Ninth Circuit's decision in this case encompasses the *Brecht* harmless-error standard. *See Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (holding that federal habeas court need not conduct harmless error once it has found *Bagley* error because finding of prejudice required for such error subsumes *Brecht* requirement of substantial and injurious effect or influence on jury's verdict). The Ninth Circuit held that because the buttons worn by the spectators at respondent's trial created an unacceptable risk of impermissible factors coming into play, they were inherently prejudicial to his constitutional right to a fair trial. *Musladin*, 427 F.3d at 658; *see also Musladin*, 427 F.3d at 661 ("[A] reasonable jurist would be compelled to conclude that the buttons worn by Studer's family

members conveyed the message that the defendant was guilty.")

How could a courtroom arrangement that was "inherently prejudicial" to the defendant's right to a fair trial and "conveyed the message that the defendant was guilty" *not* have a substantial and injurious effect or influence on the jury's verdict? At the very least, the Ninth Circuit had serious doubts about whether the constitutional error affected the jury's verdict in respondent's case, and it therefore properly granted the writ. *See O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) (holding that error may not be treated as harmless under *Brecht* if court has serious doubts about its harmlessness).

CONCLUSION

For the reasons set forth herein Respondent Mathew G. Musladin respectfully requests that the Petition for Writ of Certiorari filed by Petitioner Thomas L. Carey be denied.

Respectfully submitted,

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NO. 05-785

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS L. CAREY, WARDEN
Petitioner,
v.
MATHEW G. MUSLADIN,
Respondent.

CERTIFICATE OF SERVICE BY MAIL

I, David Fermino, counsel appointed pursuant to the Criminal Justice Act of 1964, 18 U.S. C. § 3006A(a)(2)(B), (d)(7), hereby certify that on this 7th day of March, 2006, 11copies of the Brief of Opposition to the Petition for Writ of Certiorari in the above-entitled case were sent, by Fed-Ex, a third-party commercial carrier to the Clerk of the Supreme Court of the United States and within the time allowed for filing said Brief in Opposition was served on the following counsel:

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No. 05-785

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
MAR 17 2006
OFFICE OF THE CLERK

THOMAS L. CAREY, WARDEN, *Petitioner*,

v.

MATHEW MUSLADIN, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. 05-785

THOMAS L. CAREY, WARDEN, *Petitioner,*

v.

MATHEW MUSLADIN, *Respondent.*

Respondent Mathew Musladin asserts (1) there is no "genuine" conflict in the circuit court decisions because they are in "almost complete agreement" with the decisions of this Court, (2) the Ninth Circuit's decision was consistent with 28 U.S.C. § 2254(d)(1), and (3) petitioner waived his contention that the Ninth Circuit erroneously found the alleged error structural. Musladin's attempt to rehabilitate the Ninth Circuit's decision fails and certiorari must be granted.

1. Musladin contends the conflict perceived by petitioner and seven judges of the Ninth Circuit is a "fiction." Brief in Opp. to Pet. for Writ of Cert. (Opp.) at 2; *see* Pet. for Writ of Cert. (Pet.) 8-13; Pet. App. 20a. He states, "No circuit, including the Ninth Circuit, allows the writ to be granted based on 'clearly established Federal law' as established by circuit court decisions." Opp. 4. He asserts the Ninth Circuit here did not look to it own decision, *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), to define "clearly established" federal law, but instead only to determine whether the California court's application of such law was reasonable. Opp. 3-4; *see* 28 U.S.C. § 2254(d)(1). The Ninth Circuit's own words belie Musladin's position:

> AEDPA limits the source of clearly-established federal law to Supreme Court cases. *See* 28 U.S.C. § 2254(d)(1).

> Nevertheless, we recognize that precedent from this court, or any other federal circuit court, has persuasive value in our effort to determine "whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and . . . *what law is 'clearly established.'*"

Pet. App. 5a (quoting *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000) (ellipses in *Musladin*) (italics added)). The Ninth Circuit's analysis was consistent with its mistaken premise. Under the subheading "Clearly Established Federal Law," (Pet. App. 6a) and before addressing the reasonableness of the state court's decision, the Ninth Circuit stated, "This court's decision in *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), has persuasive value in an assessment of the meaning of the federal law that was clearly-established by *Williams* and *Flynn* . . . ." Pet. App. 7a; *see also* Pet. App. 9a ("the state court's unreasonable application of federal law lies in its misapplication of the *Williams* test, as it was explained in *Norris*, to the facts of this case") ("The state court's decision to apply *Norris*, and ours to afford it persuasive weight when determining the federal law as established by *Williams*, are particularly significant in light of the striking factual similarities between *Norris* and the present case."), 13a ("The state court attempted to distinguish *Norris*, but *Norris* simply cannot reasonably be distinguished."), 14a ("We did not excuse the wearing of the buttons on that ground in *Norris*, and it was objectively unreasonable in light of *Norris* for the state court to do so here.").

The Ninth Circuit's reliance on circuit authority was not peripheral or supplementary. The question before the Ninth Circuit was whether clearly established Supreme Court authority compelled a decision other than that reached by the state court. The holdings of Supreme Court cases are the only clearly established federal law under AEDPA. *See Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Yet, the vast majority of the Ninth Circuit's decision is devoted to comparing the state court's decision to the Ninth Circuit's pre-AEDPA case, *Norris*

v. Risley, 918 F.2d 828. *See* Pet. App. 7a-15a. Musladin's suggestion that "the only reference to *Norris* was in a footnote," (Opp. 17) is flatly incorrect. Even a cursory reading of the Ninth Circuit's decision reveals that the court granted habeas relief under § 2254(d)(1) *not* because the state court's decision was contrary to or an unreasonable application of *Estelle v. Williams*, 425 U.S. 501 (1976) or *Holbrook v. Flynn*, 475 U.S. 560 (1986), but because the circuit court concluded that the state court decision was irreconcilable with *Norris*.

As Musladin acknowledges, *no* other circuit allows the writ to be granted based on the use of circuit authority to determine what federal law is "clearly established." Opp. 4. Indeed, if circuit authority is necessary to define what law is "clearly established," then perforce such law is not "clearly established" by this Court. The approach taken by the Ninth Circuit effectively allows a lower federal court to create new authority binding on the state courts by *extending* federal law clearly established by this Court. The Ninth Circuit's granting of habeas relief on the authority of its pre-AEDPA circuit law renders AEDPA standardless and conflicts with the authority of this Court, other circuit courts, and § 2254(d)(1).

2. Musladin similarly contends certiorari is not warranted because the Ninth Circuit properly considered circuit law in evaluating the reasonableness of the California Court of Appeal's application of established Supreme Court law. Petitioner has acknowledged that the existence of circuit and state cases reaching the same result as the state court "under similar circumstances" may confirm that a state court's decision was *reasonable*. Pet. 12 (citing *Price v. Vincent*, 538 U.S. 634, 643 & n.2 (2003)). That proposition is vastly different from the one invented by the Ninth Circuit in its decision below, specifically, that pre-AEDPA circuit law, to the exclusion of any and all other circuit and state court decisions, demonstrates that a state court's application of Supreme Court law was *unreasonable*. *See* Pet. App. 26a (Kleinfeld, J., dissenting). The AEDPA standard dictates that an unreasonable application

of Supreme Court law cannot be established upon a circuit court's decision that weighs no more in the equation than the state court decision to which it is compared. *See Price v. Vincent*, 538 U.S. at 643 & n.2 (federal *and* state court decisions relevant).

Musladin argues in essence that, under § 2254(d)(1), circuit courts have a free hand to interpret Supreme Court precedent, "particularly when deciding whether a given state-court decision was a reasonable application of a broadly stated Supreme Court rule." Opp. 6 (citing *Matteo v. Superintendent*, 171 F.3d 877, 890 (3d Cir. 1999)). This Court has established the opposite: "The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). Here, the established federal rule could hardly be more broad. *Estelle v. Williams*, 425 U.S. 501, and *Holbrook v. Flynn*, 475 U.S. 560, set forth a due process test in general terms, and neither case involved facts similar to those presented by the instant case. Both circumstances warrant wide deference to the state court's analysis. *See Alvarado*, 541 U.S. at 664.

Musladin's plea for deference to *circuit court* review of state court judgments reflects a misapprehension of AEDPA shared by the Ninth Circuit below. AEDPA mandates wide deference to the state court's decision where, as here, a general rule is involved. *See* 28 U.S.C. § 2254(d)(1); *Yarborough v. Alvarado*, 541 U.S. at 664. The Ninth Circuit, however, applied this Court's due process jurisprudence as though that gave *federal courts conducting habeas corpus review* wide leeway to apply their own specific strictures to the States. The Ninth Circuit used AEDPA as if it were a sword directed at state courts, when AEDPA is a shield intended precisely to foreclose such federal review of state judgments.

3. Musladin does not dispute that the alleged error here is subject to review for harmlessness under *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). *See* Opp. 24-28. He nevertheless asserts petitioner waived any dispute with the Ninth Circuit's

holding that the alleged error requires granting of the writ. Musladin conflates the issue of the appropriate standard of harmlessness with the issue whether the standard has been met. Petitioner does not request this Court to conduct harmless error review. Rather, petitioner contends the Ninth Circuit incorrectly found the alleged error was structural, when under this Court's authority, it was subject to review for harmlessness. *See Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007, 2015 (2005). The appropriate standard of harmlessness was never in dispute until the Ninth Circuit rendered its decision. A party cannot waive its opposition to an erroneous decision it cannot foresee.

Musladin also asserts that "there is no indication that the Ninth Circuit treated this error as structural." Opp. 24. The indication is this: The Ninth Circuit held that an "impermissible factor coming into play . . . . itself establishes 'inherent prejudice' and requires reversal." Pet. App. 10a; *see also id.* 11a n.1 ("As we held in *Norris*, reversal is required if a defendant can prove *either* actual *or* inherent prejudice."), 12a ("a practice that brands a defendant as guilty would surely be sufficient to demonstrate 'inherent prejudice' and require reversal"). The Ninth Circuit did not so hold because it decided petitioner waived harmless error review, because it had "serious doubts"about harmlessness, or because it found harmlessness could not be established on the facts of this case. *See* Opp. 27-28. Rather, the Ninth Circuit held that per se reversal was "required" by *Estelle v. Williams*, 425 U.S. 501 and *Holbrook v. Flynn*, 475 U.S. 560. Pet. App. 10a. The court below could not have stated its position, and misunderstood this Court's precedent, more clearly.

Musladin asserts that the Ninth Circuit's opinion "encompasses the *Brecht* harmless-error standard." Opp. 27. He asks rhetorically, "How could a courtroom arrangement that was 'inherently prejudicial' to the defendant's right to a fair trial and 'conveyed the message that the defendant was guilty' *not* have a substantial and injurious effect or influence on the jury's

verdict?" Opp. 28. The answer is simple: There is no evidence in the record that jurors saw the buttons or recognized what they depicted, let alone were influenced by them. A "courtroom practice" might be inherently prejudicial, yet never perceived by jurors.

The Ninth Circuit's decision is not an instance of garden variety error, but a dramatic misinterpretation of AEDPA. Its logic places at potential risk many if not all state court criminal judgments on federal questions which do not rest upon highly specific Supreme Court law applicable to narrowly contoured fact patterns. The Ninth Circuit announced its own circuit law, to the exclusion of any other state or federal decision, demonstrated the "clearly established" federal law under *this* Court's precedents. The court similarly found that its own circuit decision dictated that the state court's application of federal law was unreasonable simply because the state court and circuit court did not arrive at the same conclusion. The decision below is inconsistent with AEDPA and threatens systemic problems beyond the confines of the instant case.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: March 16, 2006

Respectfully submitted,

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No. 05-785

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

THOMAS L. CAREY, WARDEN,

Petitioner,

v.

MATHEW MUSLADIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed December 15, 2005
Certiorari Granted April 17, 2006

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June 5, 2000 – Petition for writ of habeas corpus filed in United States District for the Northern District of California

May 14, 2001 – Answer, memorandum of points and authorities in support of answer, and notice of lodging exhibits with court filed in district court

August 16, 2001 – Traverse to answer filed in district court

May 14, 2003 – Order denying petition for writ of habeas corpus filed in district court

June 12, 2003 – Notice of appeal and motion for certificate of appealability filed in district court

September 2, 2003 – Order granting and denying in part certificate of appealability filed in district court

December 10, 2003 – Judgment entered in district court

February 23, 2004 – Petitioner-appellant's brief filed in the United States Court of Appeals for the Ninth Circuit

May 17, 2004 – Respondent-appellee's brief filed in court of appeals

June 15, 2004 – Petitioner-appellant's reply brief filed in court of appeals

April 8, 2005 – Published opinion reversing judgment, with dissent, filed in court of appeals

April 22, 2005 – Respondent-appellee's petition for rehearing with suggestion for rehearing en banc filed in court of appeals

October 21, 2005 – Published opinion reversing judgment, with dissent, and published order withdrawing April 8, 2005, opinion filed in court of appeals

October 21, 2005 – Published order denying petition for panel rehearing and rehearing en banc, with dissents, filed in court of appeals

October 27, 2005 – Order granting respondent-appellee's motion to stay mandate pending petition for writ of certiorari filed in court of appeals

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TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,

PEOPLE AND RESPONDENT,

VS.

MATHEW GUY MUSLADIN,

DEFENDANT AND APPELLANT. /

October 16, 1995

VOLUME III

(Pages 364-537)

REPORTER'S TRANSCRIPT ON APPEAL
FROM THE JUDGMENT OF THE SUPERIOR
COURT OF THE STATE OF CALIFORNIA, IN
AND FOR THE COUNTY OF SANTA CLARA
HONORABLE PAUL R. TEILH, JUDGE
JURY TRIAL

* * *

[439] San Jose, California October 16, 1995

PROCEEDINGS

THE COURT: Someone have something else to put on the record?

MR. TARANTO: Yes, Your Honor. Thank you. Only that a man - - Your Honor, we briefly spoke in chambers. And this is about this matter and I just want to put on the record, Your Honor. This is in all due respect to the Studer family who is present here in the courtroom.

I think it's inappropriate. They are wearing buttons that show a photograph of the decedent. I would like to just say for purposes of the record, Your Honor, this is a jury trial. If it was a court trial, I wouldn't mind. As jurors sit here, they have natural feelings and natural passions. They could be inflamed over the fact that there was a photograph on Ms. Studer's breast or photograph of the decedent on Mr. Studer's chest or on the brother's chest. I just think it's inappropriate, Your Honor. I would like to have - - they can stay here. There is no problem with that.

THE COURT: I understand that. The button has nothing except a photograph?

MR. MENDOZA: That's correct, Your Honor.

THE COURT: The jury's already been instructed not to let passion or prejudice influence their verdict and they will again be instructed at the close of the case on the same subject. There is no legend on the buttons. I see no [440] possible prejudice to the defendant. The motion to have those removed is denied.

MR. TARANTO: Your Honor, is there a ruling, I think, in the alternative, any slogans or anything worn by the decedent's family, you would decide how that is handled, is that correct?

THE COURT: I have already inquired whether there was any legend other than the photograph. Apparently there is not.

MR. MENDOZA: That's correct, Your Honor. I object. That issue is not right, I don't think. If it is going to happen, if it should happen, I will bring it to the attention of the Court.

MR. TARANTO: Thank you, Your Honor.

THE COURT: Bring in the jury please, Mr. Bailiff.

(Jury brought into the courtroom and proceedings were had as follows:)

THE COURT: Let the record show all jurors are present.

Do you wish to make an opening statement, Mr. Mendoza?

MR. MENDOZA: Yes, Your Honor. Thank you.

Good afternoon, ladies and gentlemen of the jury.

Again, my name is Ray Mendoza and I represent the People of the State of California in this particular case.

* * *

No. S079768

IN THE SUPREME COURT OF CALIFORNIA

IN RE MATHEW MUSLADIN

on

HABEAS CORPUS

[Exhibit F to Petition for Writ of Habeas Corpus]

DECLARATION OF BETTY MUSLADIN

I, Betty Musladin, declare as follows:

1) I am the mother of Guy Musladin, defendant in *People v. Musladin*, Santa Clara County Number 177400. I attended the trial.

2) I saw the display buttons worn by members of Tom Studer's family. These buttons were several inches in diameter; my best guess is that they were 3 to 4 inches in diameter. They contained a picture of Tom Studer on them.

3) The members of his family that wore these buttons included his mother, father and brother. My recollection is that they all attended the entire trial, sitting immediately behind the district attorney and adjacent to the jury box. I also recall that Pam Musladin, Pam's mother, and Michael Albaugh wore the buttons during the first day of jury voir dire.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge.

Executed this 14 day of June in Fair Oaks, California.

/s/ Betty Musladin
Betty Musladin

No. S079768

IN THE SUPREME COURT OF CALIFORNIA

IN RE MATHEW MUSLADIN

on

HABEAS CORPUS

[Supplement to Exhibit C to Petition for Writ of Habeas Corpus]

DECLARATION OF FRANK TARANTO

I, Frank Taranto, declare as follows:

1) I am an attorney practicing in San Jose, California. I represented Guy Musladin at trial in *People* v. *Musladin*, Santa Clara County No. 177400.

2) Prior to trial, I noticed that several members of Tom Studer's family were wearing buttons with his photograph on them. This included his mother, father and brother. The buttons were approximately 2 inches in diameter and very noticeable.

3) I made an oral motion on Guy's behalf to direct the members of the family to remove the buttons. This motion was denied.

4) The family members sat in the front row of the courtroom, right behind the district attorney. Although it is possible that one or more of the family may have missed a day of the trial, my memory is that they were there every day of the trial.

* * *

/s/ Frank S. Taranto
Frank Taranto, Esq.

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(5)

No. 05-785

FILED

JUN 22 2006

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

THOMAS L. CAREY, Warden,

Petitioner,

v.

MATHEW MUSLADIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

In the absence of controlling Supreme Court law, did the Court of Appeals for the Ninth Circuit exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning respondent's state conviction of murder on the ground that the courtroom spectators included three family members of the victim who wore buttons depicting the deceased?

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-18a, is reported at 427 F.3d 653. The order denying rehearing and rehearing en banc, Pet. App. 19a-30a, is reported at 427 F.3d 647. The district court's opinion is unreported. Pet. App. 31a-54a. The opinion of the state court of appeal is unreported. Pet. App. 55a-78a, 80a. The orders of the state supreme court on direct review and on habeas corpus are unreported. Pet. App. 79a, 81a.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 2005. Pet. App. 1a. A petition for rehearing and rehearing en banc was denied on the same day. Pet. App. 19a. The petition for a writ of certiorari was filed on December 15, 2005, and was granted on April 17, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides that no state "shall deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254(d)(1) provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[¶] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104(3), 110 Stat. 1214, 1219 (AEDPA).

STATEMENT OF THE CASE

1. In 1994, respondent Mathew Musladin shot and killed Tom Studer, the fiancé of his estranged wife Pamela Musladin. Reporter's Transcript of Trial (RT) 477-78, 487. Respondent had been engaged in a protracted custody dispute with Pamela over their child Garrick. RT 478-82, 491. Under a custody arrangement, Garrick lived with Pamela, while respondent had a right of visitation. RT 479-80. Respondent had warned his wife during a domestic violence incident shortly after she filed for divorce that he would kill her before he would let her raise Garrick. RT 480-84, 488-91. Respondent also had warned Studer in 1993, "Yours is about to come. You will know it when it happens because you won't be around. And, you'll get yours, just remember that." RT 1734; see RT 703.

On May 13, 1994, a visitation day a few months after respondent bought his gun, the prosecutor's office contacted respondent about his refusal to pay child support. Shortly afterward, respondent appeared unexpectedly

early at the residence Pamela shared with Studer. RT 478-80, 492-95. After securing Garrick in his car, respondent announced, "'I got a call from the district attorney this morning and that's the last straw. I don't have anything left to lose.'" He continued, "'Either you sign full custody of Garrick over to me right now or I will blow both of your fucking heads off.'" RT 500-02.

Pamela started begging respondent, who shoved her on the ground. RT 502-03. Studer helped her up as her brother Mike Albaugh came outside. RT 509, 624. Neither Albaugh nor Studer was armed. RT 514, 545, 625, 640-43. Respondent reached underneath the seat of his car, took out the gun, and shot Studer in the back. RT 511-12, 625-29, 705-06, 722. Respondent walked into the garage to the front end of Studer's truck under which Studer tried to crawl and, despite Albaugh's plea that he stop, shot Studer again. Studer was struck in the head, apparently from a ricochet, as he lay partially under the truck. He died instantly. RT 629-31, 721, 723-30, 846-47, 905-08, 927, 1888, 1894.

Respondent next entered the house, kicked in a door, and pointed his gun directly at Albaugh, who had just taken refuge there after dialing 911. RT 631-34, 637-39. Respondent fled but was quickly apprehended driving his car. RT 999-1002, 1063-71. Respondent said to the police, "I didn't mean to do it. I'm sorry," and "Please, officer, forgive me." RT 1018.

2. Respondent testified at trial that he acted in self-defense. He claimed that when Mike Albaugh emerged from the house, Albaugh was wielding a machete, and was accompanied by an unarmed person near Pamela and a third person in the garage with a gun. Respondent testified he

shot at the person in the garage only because he was afraid for his life.

3. Before trial, outside the presence of the jury, respondent's counsel objected to spectators, members of Tom Studer's family, wearing buttons that depicted the decedent:

> [Defense counsel]: .... And this is about this matter and I just want to put on the record, Your Honor. This is in all due respect to the Studer family who is present here in the courtroom.
>
> I think it's inappropriate. They are wearing buttons that show a photograph of the decedent. I would like to just say for purposes of the record, Your Honor, this is a jury trial. If it was a court trial, I wouldn't mind. As jurors sit here, they have natural feelings and natural passions. They could be inflamed over the fact that there was a photograph on Ms. Studer's breast or photograph of the decedent on Mr. Studer's chest or on the brother's chest. I just think it's inappropriate, Your Honor. I would like to have - - they can stay here. There is no problem with that.
>
> THE COURT: I understand that. The button has nothing except a photograph?
>
> [Prosecutor]: That's correct, Your Honor.
>
> THE COURT: The jury's already been instructed not to let passion or prejudice influence their verdict and they will again be instructed at the close of the case on the same subject. There is no legend on the buttons. I see no possible prejudice to the defendant. The motion to have those removed is denied.

Joint Appendix (J.A.) 3-4. Neither the buttons nor the picture on them was seen by any court other than the state trial judge. See Pet. App. 73a-74a.

4. The jury convicted respondent of first degree murder, attempted premeditated murder, first degree burglary, and assault with a firearm, with personal use of a firearm. See Cal. Penal Code §§ 21a, 187(a), 189, 245(a)(1), 459, 460(a), 664, 12022.5(a)(1). He was sentenced to thirty-two years to life in prison. Pet. App. 33a, 55a.

5. The California Court of Appeal affirmed the judgment, rejecting respondent's contention that the spectators' buttons had deprived him of a fair trial. Pet. App. 55a. Citing *Holbrook* v. *Flynn*, 475 U.S. 560, 570 (1986), the state appellate court found that respondent had to show actual or inherent prejudice from the presence of the buttons. As respondent did not claim actual prejudice, the appellate court addressed inherent prejudice. Pet. App. 74a & n.11. It stated: "The test for inherent prejudice is . . . whether an unacceptable risk is presented of impermissible factors coming into play. This test requires us to examine two factors: first, whether there is an impermissible factor coming into play, and second, whether it poses an unacceptable risk." Pet. App. 74a (quoting *Woods* v. *Dugger*, 923 F.2d 1454, 1457 (11th Cir. 1991) (citations and internal quotation marks omitted)). Using that test the state court distinguished *Norris* v. *Risley*, 918 F.2d 828 (9th Cir. 1990), which overturned a conviction where several female spectators had worn large buttons reading "Women Against Rape" at a rape trial. The state court reasoned:

> [T]he message to be conveyed by the Studer family wearing buttons is less than clear. The simple photograph of Tom Studer was unlikely to have

> been taken as a sign of anything other than the normal grief occasioned by the loss of a family member. While we consider the wearing of photographs of victims in a courtroom to be an "impermissible factor coming into play," the practice of which should be discouraged, we do not believe the buttons in this case branded defendant "with an unmistakable mark of guilt" in the eyes of the jurors. (See *Holbrook* v. *Flynn*, *supra*, 475 U.S. at pp. 570-571.)

Pet. App. 74a-75a. Rehearing was denied. Pet. App. 80a. The California Supreme Court denied review. Pet. App. 79a.

6. In 1999, respondent filed a petition for writ of habeas corpus in the California Supreme Court. Respondent attached declarations by his mother and his trial counsel[1] alleging facts outside the trial record: The buttons were either two inches (trial counsel) or three to four inches (respondent's mother) in diameter, and were worn by Tom Studer's mother, father, and brother, each of whom attended most or all of the trial and sat in the front row of the gallery, behind the prosecutor. J.A. 6-8. Respondent's mother averred that Pamela Musladin, Pamela's mother, and Michael Albaugh wore the buttons on the first day of jury voir dire. J.A. 6. The habeas petition was denied without comment in 2000. Pet. App. 81a.

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[1] Respondent's trial counsel's declaration was unsworn and undated. J.A. 8. It lacks probative value under California law. See Cal. Civ. Proc. Code §§ 2002-2003, 2015.5; *People* v. *Madaris*, 122 Cal. App. 3d 234, 242, 175 Cal. Rptr. 869, 873 (1981), *disapproved on other grounds in People* v. *Barrick*, 33 Cal. 3d 115, 127, 654 P.2d 1243, 1250, 187 Cal. Rptr. 716, 723 (1982).

7. The same year, respondent filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In denying relief, the district court observed that this Court had not specifically addressed spectator buttons. It distinguished both *Estelle* v. *Williams*, 425 U.S. 501 (1976), which had held that compelling a defendant to wear jail clothing at trial violates the right to a fair trial, and *Norris*, 918 F.2d 828, which had involved courtroom practices "related directly to the respective defendant's guilt." Pet. App. 47a-50a. The district court found the "message to be derived from the buttons in this case . . . was not as clear" as that conveyed by the courtroom practices in *Williams* and *Norris*. "Although it amounted to a showing of solidarity by the victim's family, it did not necessarily undermine the presumption of innocence." The district court concluded, "Although allowing the buttons was arguably not a prudent decision by the trial judge, it cannot be said that it was contrary to or an unreasonable application of clearly established federal law" as set forth in *Williams*. Pet. App. 47a-50a, 54a.

8. On appeal, a divided panel of the Ninth Circuit reversed and granted the writ. *Musladin* v. *Lamarque*, 403 F.3d 1072 (9th Cir. 2005). Petitioner Carey filed a petition for rehearing with a suggestion for rehearing en banc.

9. On October 21, 2005, the Ninth Circuit filed a new opinion, without a change in the judgment. Pet. App. 1a-15a; *Musladin* v. *Lamarque*, 427 F.3d 653 (9th Cir. 2005). The Ninth Circuit's opinion, authored by Judge Reinhardt, held the state appellate court's rejection of the claim of constitutional error in allowing the spectators' buttons was an unreasonable application of *Estelle* v. *Williams*, 425 U.S. 501, and *Holbrook* v. *Flynn*, 475 U.S. 560. The Ninth Circuit accorded *Norris* v. *Risley*, 918 F.2d 828, "persuasive value"

in deciding that the state court's application of *Williams* and *Flynn* was unreasonable, particularly because the state court had discussed *Norris*. Pet. App. 7a-9a. *Norris*, according to the federal circuit court, could not "reasonably be distinguished," for the "message conveyed" by the buttons in the present case was "even stronger and more prejudicial" than the message conveyed by the "Women Against Rape" buttons worn by the *Norris* spectators. Pet. App. 8a, 13a. Specifically, the three buttons depicting Studer "essentially 'argue' that Studer was the innocent party and that the defendant was necessarily guilty; that the defendant, not Studer, was the initiator of the attack, and thus, the perpetrator of a criminal act." Pet. App. 13a. The appeals court additionally found that the state court acted "contrary to" and unreasonably applied *Williams* and *Flynn* by burdening respondent with an unnecessary element of proof, namely, that the buttons "branded" respondent with an "unmistakable mark of guilt." The federal court held that once the state court found an "impermissible factor," reversal was required without respondent having to show that he had been "branded." Pet. App. 10a-12a, 15a.

Judge Thompson dissented, finding that the state court's decision was neither contrary to nor an unreasonable application of established Supreme Court law. Pet. App. 15a. Judge Thompson found neither *Williams* nor *Norris* sufficiently analogous to respondent's case to compel relief, since the "message," if any, conveyed by the Studer family buttons was nothing more than the "normal grief occasioned by the loss of a family member." The state court's reference to its view that the buttons had not "branded" respondent, Judge Thompson explained, was simply shorthand for holding that the buttons were not so

inherently prejudicial as to violate respondent's right to a fair trial. Pet. App. 15a-18a.

10. On the same day, the Ninth Circuit denied petitioner Carey's petition for rehearing and rehearing en banc in a published order. Pet. App. 19a; *Musladin* v. *Lamarque*, 427 F.3d 647 (9th Cir. 2005). Judge Kleinfeld (joined by Judges Kozinski, O'Scannlain, Tallman, Bybee, Callahan, and Bea) dissented. Judge Kleinfeld contended that the court had "effectively erased" 28 U.S.C. § 2254(d) and that the panel's inquiry should have begun and ended with the fact that no clearly established Supreme Court case holds "silent signals of affiliation by spectators in a courtroom deny a defendant due process by eroding his presumption of innocence." Pet. App. 22a. His seven-judge dissent criticized the panel majority's extension of *Norris* to fill in conclusively the large gap between the two remotely analogous "bookends," *Williams* and *Flynn*. Pet. App. 22a-24a. Maintaining that the panel majority had departed from the decisions of other circuits, which properly constrain their reliance on circuit authority in cases arising under AEDPA, Judge Kleinfeld observed, "[O]ur panel is unique in how boldly it has flown in the face of the statutory restriction to Supreme Court decisions." Pet. App. 26a. He concluded that the panel majority had thus "arrogated to our court power that we do not legitimately possess," an error he believed was "symptomatic of a deeper problem than its misapplication of Supreme Court precedent to spectators' photo buttons." Pet. App. 27a.

Judge Kleinfeld also criticized as narrow and unyielding the panel majority's interpretation of the effect of the buttons, explaining that spectator alliances with a defendant or the prosecution are common, not improper, and part and parcel of the constitutional guarantee of a public

trial. Pet. App. 26a-28a. He predicted the decision would create confusion in the state court systems within the Ninth Circuit, which will not know whether to follow circuit or Supreme Court precedent. Finally, Judge Kleinfeld reiterated his view that, under the panel majority's decision, "[w]e have effectively turned ourselves into the supreme court of the nine states in our circuit." Pet. App. 28a-29a.

Judge Bea (joined by Judges Kozinski, O'Scannlain, and Kleinfeld) also dissented. Judge Bea opined that the court had erroneously treated an "inherently prejudicial" courtroom practice as structural error requiring automatic reversal, contrary to *Williams* and *Flynn*. Pet. App. 29a-30a.

SUMMARY OF ARGUMENT

1. The Ninth Circuit violated AEDPA by failing to defer to a state court decision that reasonably fits within the matrix of this Court's holdings concerning a criminal defendant's right to a fair trial. In *Holbrook* v. *Flynn*, 475 U.S. 560 (1986), and *Estelle* v. *Williams*, 425 U.S. 501 (1976), this Court established a general principle that courtroom practices sometimes might be so inherently prejudicial as to violate the defendant's right to a fair trial. Neither *Flynn* nor *Williams*, however, involved a courtroom practice similar to that in the instant case. The contours of the Court's general rule, including what factors the courts should consider in assessing the impact of a courtroom practice, are likewise unclear. Where faced with applying a general rule, with no factually similar Supreme Court cases and little guidance on the appropriate factors for consideration in its analysis, the state court should be

given the maximum amount of deference. Habeas relief should not lie under these circumstances unless the state court's decision exceeds all bounds of reasonableness.

Instead of giving maximum deference to the state court's application of this Court's holdings in *Flynn* and *Williams*, the Ninth Circuit granted relief on the basis of its own pre-AEDPA case, *Norris* v. *Risley*, 918 F.2d 828 (9th Cir. 1990). In relying on *Norris* to grant habeas relief, the Ninth Circuit violated AEDPA's requirement that only the holdings of this Court determine what federal law is "clearly established." Neither circuit nor state precedent has any impact on what is clearly established federal law for purposes of 28 U.S.C. § 2254(d)(1). If a federal habeas court looks to circuit or state precedent to help define clearly established federal law for purposes of § 2254(d)(1), then such law is not clearly established by this Court.

The Ninth Circuit's wholesale reliance on *Norris* likewise violated § 2254(d)(1)'s requirement that habeas relief not issue unless the state court's application of clearly established federal law was "objectively unreasonable." While this Court has instructed that circuit and state cases may assist in demonstrating that a state court's application of federal law was reasonable, such cases remain only instructive. In any event, circuit and state cases cannot by themselves demonstrate that a state court's application of this Court's authority was unreasonable, no matter how strong their numbers. The end question under AEDPA is not whether the state court decision comports with *any* circuit or state authority, but simply whether it is an objectively reasonable application of this Court's holdings.

2. In addition, and in violation of this Court's instructions in *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (per curiam), the Ninth Circuit selectively parsed the state court opinion to tease out what it mistakenly characterized as an incorrect standard employed by the state court. The context of the state court's recitation of the standard makes the Ninth Circuit's interpretation untenable. While the state court's recitation of the applicable standard was arguably imprecise, it was neither contrary to nor an unreasonable application of this Court's precedent.

3. Finally, contrary to *Deck* v. *Missouri*, 544 U.S. 622 (2005), the Ninth Circuit erroneously conflated the notion of "inherent prejudice" with that of structural error, concluding that a finding of inherent prejudice requires reversal without further inquiry. This Court has explicitly held that while a showing of inherent prejudice may relieve a defendant from showing actual prejudice, it does not remove the opportunity for the state to show harmlessness.

ARGUMENT

THE STATE COURT'S DECISION DESERVED HEIGHTENED DEFERENCE UNDER AEDPA SINCE IT INVOLVED THE APPLICATION OF A GENERAL RULE WITH UNCLEAR CONTOURS, AND NO CASES OF THIS COURT ADDRESS SIMILAR FACTS

AEDPA dramatically modified federal habeas review of state judgments. *Bell* v. *Cone*, 535 U.S. 685, 693 (2002). AEDPA eliminated independent federal review of state court adjudications on the merits, instituting instead

a "highly deferential standard" of review. *Lindh* v. *Murphy*, 521 U.S. 320, 333 n.7 (1997). Under AEDPA, where the state court has adjudicated a federal claim such as respondent's on the merits, habeas corpus relief lies only where the state court decision was "contrary to, or involved an unreasonable application of," clearly established Supreme Court law. 28 U.S.C. § 2254(d)(1). An unreasonable application is one that "identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams* v. *Taylor*, 529 U.S. 362, 405 (2000).

The Ninth Circuit here recited § 2254(d)(1) and the limitations it imposes. The court never honored those limitations, however. Instead of basing its decision strictly on the clearly established holdings of this Court, it based its decision on its own pre-AEDPA circuit law. Instead of determining whether the state court decision was objectively reasonable, the Ninth Circuit overturned the decision merely because it disagreed with it.

A. The Ninth Circuit's Wholesale Reliance On *Norris* Contravened AEDPA

The Ninth Circuit's sweeping reliance on *Norris* v. *Risley*, 918 F.2d 828 (9th Cir. 1990), to overturn respondent's murder conviction is unprecedented in its disregard for 28 U.S.C. § 2254(d)(1). The Ninth Circuit used *Norris* not only to determine what law is clearly established, but also to conclude dispositively that the state court's refusal to follow *Norris* was unreasonable. As a practical matter, the Ninth Circuit simply reviewed the state court judgment de novo.

1. Circuit and state precedent have no role in defining or shaping "clearly established" federal law for purposes of § 2254(d)(1)

Section 2254(d)(1) limits the source of "clearly established federal law" to the holdings of this Court alone. *Williams* v. *Taylor*, 529 U.S. at 412. Neither circuit nor state authority impacts what law is clearly established for purposes of § 2254(d)(1). Cf. *Tyler* v. *Cain*, 533 U.S. 656, 663 (2001) (interpreting "by the Supreme Court" in § 2244(d)(2)(A)(i) to mean "not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court"). This Court has never suggested otherwise.

Moreover, the legal principle upon which the habeas petitioner relies must be announced by this Court definitively. *Mitchell* v. *Esparza*, 540 U.S. 12, 17 (2003) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous."); see *Kane* v. *Espitia*, 126 S. Ct. 407, 408 (2005) (per curiam) (noting where circuits are split but Supreme Court has not expressly ruled on an issue, no clearly established law exists). "Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004).

This Court has never addressed the propriety of courtroom spectators during a criminal trial wearing buttons or other paraphernalia depicting a victim. See Pet. App. 22a, 48a; see also Recent Case, Musladin *v.* Lamarque, *403 F.3d 1072 (9th Cir. 2005)*, 119 HARV. L. REV. 1931, 1935 n.44 (2006) ("There are very few Supreme Court

opinions that explicitly address what constitutes deprivation of a fair trial."). *Holbrook* v. *Flynn*, 475 U.S. 560 (1986), and *Estelle* v. *Williams*, 425 U.S. 501 (1976), while not involving those circumstances, provide the closest Supreme Court authority for reviewing a claim of constitutional error in permitting spectators to wear buttons at a criminal trial. In *Flynn*, discussed by the state court, Pet. App. 74a-75a, the Court held that the presence of several armed uniformed officers in the spectators' row directly behind the defendant was not inherently prejudicial. 475 U.S. at 568-69. In *Williams*, the Court held that forcing a defendant to wear prison clothes at trial was inherently prejudicial. 425 U.S. at 530 n.10.

Flynn and *Williams* clearly establish a general rule that some courtroom practices might be "so inherently prejudicial that [the defendant] was thereby denied his constitutional right to a fair trial." *Holbrook* v. *Flynn*, 475 U.S. at 570 (armed, uniformed officers not inherently prejudicial); see *Estelle* v. *Williams*, 425 U.S. 501 (prison clothing inherently prejudicial); see also *Deck* v. *Missouri*, 544 U.S. 622 (visible shackling inherently prejudicial). *Flynn* and *Williams* do not, however, directly address conduct by courtroom spectators. Thus, while *Flynn* and *Williams* clearly established a general rule, it is not at all clearly established that the rule controls the instant circumstances. Cf. Pet. App. 22a ("The only question for us is whether there is any Supreme Court authority that holds that silent signals of affiliation by spectators in a courtroom deny a defendant due process by eroding his presumption of innocence. The answer is that there is no such case.") (Kleinfeld, J., dissenting from order denying rehearing en banc); see also *Estelle* v. *McGuire*, 502 U.S. 62, 72-73 (1991) (noting that beyond specific guarantees

listed in Bill of Rights, Due Process Clause has limited operation, and that Court has defined very narrowly the category of infractions that violate "fundamental fairness"). If not barring habeas relief altogether, see *id.*, this uncertainty should have prescribed additional deference towards the state court decision.

Despite AEDPA's limitations and the highly general nature of this Court's clearly established principle regulating courtroom practices, the Ninth Circuit announced that its own precedent "has persuasive value" in determining "what law is 'clearly established.'" Pet. App. 5a (citing *Duhaime* v. *Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000)). The Ninth Circuit's statement was not an isolated misstep, but a pervasive theme throughout its opinion. See Pet. App. at 7a (under heading of "clearly established federal law," stating *Norris* "has persuasive value in an assessment of the meaning of the federal law that was clearly established"), 9a (state court misapplied "*Williams* test, as it was explained in *Norris*"; affording *Norris* "persuasive weight when determining the federal law established by *Williams*"), 14a ("objectively unreasonable in light of *Norris*"). On more than one occasion, the Ninth Circuit faulted the state court for its alleged misapplication of *Norris*, as opposed to this Court's precedent. See Pet. App. 8a-9a, 13a-14a. It is clear from the Ninth Circuit's own words that it in fact used circuit precedent to *define* the applicable "clearly established" federal law. See Recent Case, *supra*, 119 HARV. L. REV. 1931; Pet. App. 5a, 7a, 9a, 14a.

The Ninth Circuit attempted to justify its reliance on *Norris* by asserting that the state court had "identified *Norris* as setting forth the operative law as announced by the Supreme Court, and . . . sought to apply *Norris* when reaching its determination." Pet. App. 8a-9a. The assertion

is untrue and irrelevant. The state court did no more than distinguish *Norris*. Pet. App. 74a-75a. Regardless, since circuit law does not control under § 2254(d)(1), surely a state court may ignore, address, or even misapply circuit law without thereby suffering a later adverse decision under § 2254(d)(1). The state court was not bound by the circuit court's earlier decision, even on matters of federal law. *People* v. *Bradley*, 1 Cal. 3d 80, 86, 460 P.2d 129, 132, 81 Cal. Rptr. 457, 460 (1969); see *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 58-59 n.11 (1997) (citing *Lockhart* v. *Fretwell*, 506 U.S. 364, 375-76 (1993) (Thomas, J., concurring)); *Bell* v. *Hill*, 190 F.3d 1089, 1093 (9th Cir. 1999). AEDPA does not permit a federal habeas court to review the state court's reasoning concerning decisions of federal circuit courts.

The Ninth Circuit's reliance on circuit authority to define clearly established federal law under § 2254(d)(1) was not simply nominal. The Ninth Circuit reversed respondent's murder conviction because it believed "*Norris* simply cannot reasonably be distinguished." Pet. App. 13a. If, as here, a circuit court may use its own authority to define or extend clearly established federal law under § 2254(d)(1), then that provision as amended by AEDPA is vitiated. See *Yarborough* v. *Alvarado*, 541 U.S. at 666. Put differently, if circuit or state precedent is necessary to define what law is clearly established, then such law is not clearly established by this Court.

The only "rule" the Ninth Circuit was permitted to consider as *authority* under § 2254(d)(1), was the general principle set forth in *Flynn* and *Williams*: that some courtroom practices might be "so inherently prejudicial that [a defendant] was thereby denied his constitutional right to a fair trial." *Flynn*, 475 U.S. at 570. The Ninth Circuit plainly violated § 2254(d)(1)'s requirement of

basing habeas relief only upon "clearly established" law enunciated in the holdings of this Court. *Williams* v. *Taylor*, 529 U.S. at 412.

2. The state court decision deserved heightened deference in its application of this Court's general rule

Not only did the Ninth Circuit improperly use circuit court precedent to define clearly established law under § 2254(d)(1), it also failed to give any deference to the state court's decision applying clearly established law. Such latitude is especially appropriate because of the general nature of this Court's rule.

a. Habeas relief may be warranted upon an "objectively unreasonable" application of clearly established Supreme Court law. *Brown* v. *Payton*, 544 U.S. 133, 141 (2005); *Woodford* v. *Visciotti*, 537 U.S. at 24-25. In *Williams*, this Court declined to define the term unreasonable but suggested the term held no different meaning under § 2254(d)(1) than in other legal contexts. *Williams* v. *Taylor*, 529 U.S. at 410. The Court explained, "[T]he most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.*

Under the circumstances of this case, the state court decision deserved the utmost deference. Not only is the rule at issue here general, it has appeared in varying formulations. See, e.g., *Holbrook* v. *Flynn*, 475 U.S. at 570 ("The only question we need answer is thus whether the presence of these four uniformed and armed officers was so inherently prejudicial that respondent was thereby denied his constitutional right to a fair trial."); *id.* ("whether 'an unacceptable risk is presented of impermissible factors

coming into play'" (quoting *Estelle* v. *Williams*, 425 U.S. at 505)); *id.* at 571 ("we simply cannot find an unacceptable risk of prejudice in the spectacle"); *id.* ("we cannot believe the use of the four troopers tended to brand respondent in [the jurors'] eyes 'with an unmistakable mark of guilt'" (quoting *Williams*, 425 U.S. at 518 (Brennan, J., dissenting))); *id.* at 572 ("All a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial . . . ."). The Court has clarified that the level of deference required by § 2254(d)(1) increases where, as here, a general rule is involved: "The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough* v. *Alvarado*, 541 U.S. at 664 ("custody" test for purposes of *Miranda* is general).

Given that the precise contours of the Court's rule against inherently prejudicial courtroom practices remain unclear, maximum deference to state court decisions on this issue is surely warranted. See *Lockyer* v. *Andrade*, 538 U.S. 63, 76 (2003). The Court has not, for example, defined the factors courts should consider in assessing the prejudicial impact of a particular courtroom practice, or how much weight to afford such factors. Cf. *id.* at 72 (noting in Eighth Amendment context that while general "gross disproportionality" principle is clearly established, Supreme Court cases "exhibit a lack of clarity" on what factors are relevant to the principle). The Court also has not addressed the role of victims' rights or a spectator's First Amendment rights at a public trial. See generally Terri A. Belanger, *Symbolic Expressions in the Courtroom: The Right to a Fair Trial Versus Freedom of Speech*, 62

GEO. WASH. L. REV. 318 (1994) (discussing *Norris* and considerations of spectator free speech). That neither *Flynn* nor *Williams* involved facts similar to those here only adds to the uncertain reach of the general principle announced in those decisions. These combined circumstances warrant the utmost deference to the state court's decision. Stated another way, given the broad and imprecise nature of this Court's rule, a federal habeas court must be especially diligent not to take a grudging approach to its assessment of state court reasonableness. Instead, habeas relief should not lie unless the state court's conclusion exceeds all bounds of reasonableness.

b. The precise role, if any, of circuit and state cases in evaluating the reasonableness of a state court's application of Supreme Court precedent under § 2254(d)(1) has not been resolved. This Court has indicated that the existence of circuit and state cases reaching the same result as the state court "under similar circumstances" may confirm that a state court's decision was reasonable. *Price* v. *Vincent*, 538 U.S. 634, 643 & n.2 (2003). The Court otherwise has not addressed the question, however.

Circuit decisions are not entirely consistent on the question. Some circuit courts have found that lower federal court decisions are instructive on whether a given application of Supreme Court authority is reasonable. See, e.g., *Ouber* v. *Guarino*, 293 F.3d 19, 26-27 (1st Cir. 2002) (finding helpful precedents from lower courts in determining how a general standard applies); *Chadwick* v. *Janecka*, 312 F.3d 597, 613 (3d Cir. 2002) (holding federal courts not precluded from considering lower court decisions when evaluating whether the state court's application of law was reasonable); *Williams* v. *Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003) (holding reasonableness of state court's application

of Supreme Court precedent may be established by showing other circuits similarly applied the precedent); *Duhaime* v. *Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000) (finding circuit cases persuasive in determining if state court unreasonably applied Supreme Court law). Other circuit courts are more restrictive in their application of lower court authority in reviewing state court judgments, treating such authority as dicta or precluding its consideration altogether. See, e.g., *Mitzel* v. *Tate*, 267 F.3d 524, 531 (6th Cir. 2001) (holding habeas court may not look to circuit decisions in deciding if state court decision unreasonably applied clearly established federal law); *Bell* v. *Jarvis*, 236 F.3d 149, 162 (4th Cir. 2000) (finding circuit law has no determinative or precedential effect; "At best, it constitutes a body of constitutional dicta."); *Bocian* v. *Godinez*, 101 F.3d 465, 471 (7th Cir. 1996) (recognizing federal courts no longer permitted to apply circuit law, but must look exclusively to Supreme Court cases).

Despite inconsistency among the federal courts, there appears to be no authority supporting the Ninth Circuit's view that a pre-AEDPA circuit court decision may dictate that a state court decision was an *unreasonable* application of Supreme Court authority under § 2254(d)(1). There is simply no difference between such treatment and pre-AEDPA independent review. See Recent Case, *supra*, 119 HARV. L. REV. at 1931 ("Ninth Circuit's circumvention of AEDPA's mandate likely represents a strategic expression of its own discomfort with the statute"), 1935 (*Musladin* "channels the Ninth Circuit's discomfort with enforcing AEDPA mandates"). If, as here, federal circuit law may compel habeas relief, then AEDPA's requirement that only an unreasonable application of a Supreme Court holding may justify habeas relief is null.

Moreover, while this Court has indicated that circuit and state cases may demonstrate that a state court's application of Supreme Court law was reasonable, see *Price* v. *Vincent*, 538 U.S. at 643 & n.2, it has not suggested the opposite: that circuit and state cases may demonstrate that a state court's application of Supreme Court law was *un*reasonable. The question under AEDPA is the objective reasonableness of the state court's decision under this Court's precedents, not the extent to which that decision comports with circuit and state cases. Circuit and state cases rightfully serve as examples of application of a Supreme Court precedent, but cannot constitute *authority* under AEDPA for defining an unreasonable application of this Court's precedent. See Pet. App. 26a ("saying that the state court decision is *not* unreasonable because some federal courts have reached similar conclusions is not at all the same as saying that the state court decision *is* unreasonable because a circuit court has reached a contrary conclusion") (Kleinfeld, J., dissenting from order denying rehearing en banc).

Indeed, non-AEDPA precedent from circuit or state courts hold no analytical value under § 2254(d)(1). A non-AEDPA circuit decision on a question of substantive federal law speaks only to error, and is not binding on state courts. See *Arizonans for Official English* v. *Arizona*, 520 U.S. at 58-59 n.11 (citing *Lockhart* v. *Fretwell*, 506 U.S. at 375-76 (Thomas, J., concurring)); *People* v. *Bradley*, 1 Cal. 3d at 86, 460 P.2d at 132, 81 Cal. Rptr. at 460.[2] An

[2] As the Fourth Circuit pointed out in addressing a claim similar to that raised here, *Norris* itself would have reached a different conclusion had it been decided under AEDPA: "[T]hat decision is relevant to this habeas case only insofar as it would have been objectively unreasonable under Supreme Court precedent to reach a contrary conclusion, and it

(Continued on following page)

incorrect or erroneous application of law, however, is different from an unreasonable application of that law. *Williams* v. *Taylor*, 529 U.S. at 410; see *Brown* v. *Payton*, 544 U.S. at 143; see also *Lockyer* v. *Andrade*, 538 U.S. at 75 ("clear error" standard "fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness").

The difference between AEDPA and non-AEDPA decisions is not only one of substantial leeway in application, see § 2254(d)(1), but also practical relevance. A non-AEDPA decision on a question of substantive constitutional law is necessarily not confined to Supreme Court law, let alone "clearly established" Supreme Court law, as its source of authority. See 28 U.S.C. § 2254(d)(1). A non-AEDPA decision also has no occasion to address the reasonableness of conclusions other than that reached therein. Further, where, as here, a general due process standard is involved, non-AEDPA decisions hold even less value, as the scope of reasonableness increases depending on the generality of the rule. See *Yarborough* v. *Alvarado*, 541 U.S. at 664.

As Judge Kleinfeld recognized, the Ninth Circuit's reliance on circuit authority as binding in the face of AEDPA's mandates leaves state courts with conflicting guidance in addressing federal constitutional claims. Pet. App. 28a. State courts are not bound by circuit decisions, and are equally capable of evaluating claims of federal constitutional error. See *Arizonans for Official English* v.

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most assuredly would not have been objectively unreasonable under Supreme Court precedent to reach a contrary conclusion in *Norris*." *Billings* v. *Polk*, 441 F.3d 238, 246-47 (4th Cir. 2006) (citations omitted).

Arizona, 520 U.S. at 58-59 n.11; *Brecht* v. *Abrahamson*, 507 U.S. at 636. Yet, under the Ninth Circuit's reasoning, state courts face the question of whether their evaluation of federal constitutional claims is assessed for reasonableness against this Court's holdings, or for error against Ninth Circuit law. Pet. App. 24a. Under the Ninth Circuit's reasoning, AEDPA did not affect habeas review at all. Congress did not, however, enact AEDPA as an idle exercise. See *Williams* v. *Taylor*, 529 U.S. at 403-07.

In sum, the Ninth Circuit's reliance on circuit authority to find conclusively that the state court unreasonably applied this Court's holdings was an abrogation of AEDPA. Although a circuit court may consider circuit and state cases to demonstrate that an application of this Court's authority was reasonable, no court has held that a state decision may be found unreasonable simply because a circuit court has reached a contrary conclusion on arguably similar facts. Pet. App. 26a.

c. Here, the state court decision rejecting respondent's claim was a reasonable application of this Court's precedents. The circumstances of this case are more analogous to *Holbrook* v. *Flynn* than *Estelle* v. *Williams*, and thus well within the "matrix" of this Court's decisions. See *Yarborough* v. *Alvarado*, 541 U.S. at 665; Pet. App. 23a; see also *Estelle* v. *McGuire*, 502 U.S. at 72-73 (noting that beyond specific guarantees listed in Bill of Rights, Due Process Clause has limited operation, and that Court has defined very narrowly the category of infractions that violate "fundamental fairness"). The challenged courtroom "practice" in *Flynn* consisted of four uniformed, armed state police officers sitting in the first row of the gallery, directly behind the defendants, throughout their two-month trial. *Flynn*, 475 U.S. at 562 n.2, 565, 570. The challenged practice here consisted of three family members

wearing buttons depicting the victim, Tom Studer, while sitting in the first row of the gallery behind the prosecutor during one or more days of respondent's two-week trial. J.A. 4, 6, 8.[3] The challenged practice in *Williams*, in contrast, consisted of the defendant being compelled to wear prison clothing during his trial. *Williams*, 425 U.S. at 502. *Williams* also involved equal protection concerns not present here or in *Flynn*. See *id.* at 505-06.

Not only are the instant circumstances more akin to those in *Flynn* than *Williams*, the challenged practice here is far less potentially prejudicial than the practice involved in either of those cases. The allegedly offending practice in *Flynn* and *Williams* was the result of state action. The critical fact in *Flynn* was the presence of uniformed state troopers to provide additional security, 475 U.S. at 570, while the critical fact in *Williams* was that the defendant had allegedly been *compelled* to wear prison clothing. See *Williams*, 425 U.S. at 506-13. Here, in contrast, there was no government endorsement of the display of the buttons or any "message" they allegedly sent.

The instant case is also similar to *Flynn* in the wide range of arguable inferences that a juror might draw from the buttons. See *Flynn*, 475 U.S. at 569. The buttons here bore only a photograph of Tom Studer, without any writing. J.A. 4, 6, 8. As to what, if anything, jurors might have gleaned, the state court found the buttons were "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member."

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[3] The trial record reveals only that respondent's counsel complained of the buttons on a single day at the start of trial. J.A. 3-4. The supplemental declaration submitted by respondent's mother in state habeas proceedings does not unambiguously allege that the buttons were displayed for more than a single day. J.A. 6.

Pet. App. 75a. In light of "reason, principle, and common human experience," *Williams*, 425 U.S. at 504, this was, if not the only reasonable inference, at least an eminently reasonable one. See *Flynn*, 475 U.S. at 569 (uniformed officers); *Billings* v. *Polk*, 441 F.3d at 247 (T-shirt worn by juror); *In re Woods*, 154 Wash. 2d 400, 416-18, 114 P.3d 607, 616-17 (2005) (ribbons); *State* v. *Lord*, 128 Wash. App. 216, 218-23, 114 P.3d 1241, 1242-45 (2005) (buttons), *review granted*, 156 Wash. 2d 1038 (2006); *People* v. *Houston*, 130 Cal. App. 4th 279, 309-20, 29 Cal. Rptr. 3d 818, 842-52 & n.9 (buttons) (distinguishing original, withdrawn *Musladin* opinion), *review denied*, 2005 Cal. LEXIS 10686 (2005); *Pachl* v. *Zenon*, 145 Or. App. 350, 353-60, 929 P.2d 1088, 1090-95 (1996) (buttons); *People* v. *King*, 214 Mich. App. 301, 305, 544 N.W.2d 765, 768 (1996) (buttons); *State* v. *Richey*, 171 W. Va. 342, 351-52, 298 S.E.2d 879, 888-89 (1982) (mere presence of spectator support); Pet. App. 17a, 26a-27a, 49a; see also *Davis* v. *State*, 2006 Tex. App. LEXIS 3882, **20-21 (May 3, 2006) (no showing of prejudice—"victim medallions" bearing picture); *Johnson* v. *Commonwealth*, 259 Va. 654, 676, 529 S.E.2d 769, 781-82 (2000) (same—buttons); *Cagle* v. *State*, 68 Ark. App. 248, 248-50, 6 S.W.3d 801, 801-03 (1999) (same—buttons); *Nguyen* v. *State*, 977 S.W.2d 450, 457 (Tex. App.) (same—buttons), *aff'd*, 1 S.W.3d 694 (Tex. Crim. App. 1998); *Buckner* v. *State*, 714 So. 2d 384, 388-89 (Fla. 1998) (same—photos); *State* v. *Speed*, 265 Kan. 26, 47-48, 961 P.2d 13, 29-30 (1998) (same—buttons); *Kenyon* v. *State*, 58 Ark. App. 24, 26-35, 946 S.W.2d 705, 706-11 (1997) (same—buttons); *State* v. *Nelson*, 705 So. 2d 758, 763 (La. Ct. App. 1997) (same—T-shirts)); *Howard* v. *State*, 941 S.W.2d 102, 117-18 (Tex. Crim. App. 1996) (same—uniformed officers); *State* v. *Braxton*, 344 N.C. 702, 709-10, 477 S.E.2d 172, 176-77 (1996) (same—buttons); *Mitchell* v. *State*, 884 P.2d 1186, 1196 (Okla. Crim. App. 1994) (same—buttons);

State v. *Bradford*, 254 Kan. 133, 141-42, 864 P.2d 680, 686-87 (1993) (same—buttons); *State* v. *McNaught*, 238 Kan. 567, 576-81, 713 P.2d 457, 466-68 (1986) (same—buttons); cf. *Williams*, 425 U.S. at 567 ("jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance"); *Whitehead* v. *Cowan*, 263 F.3d 708, 723-25 (7th Cir. 2001) ("Any jury would expect that a close relative of the victim would have strong emotions towards the suspected killer."); *Kinnamon* v. *Scott*, 40 F.3d 731, 734 (5th Cir. 1994) ("That the young girl was upset and angry at the person accused by the state as the murderer of her father communicated nothing new to the jury.").

The Ninth Circuit's holding, that only a single, prejudicial message could be gleaned from an unadorned photo, "was nowhere close to the mark." *Yarborough v. Alvarado*, 541 U.S. at 665; see Pet. App. 13a. The Ninth Circuit found, "The buttons essentially 'argue' that Studer was the innocent party and that the defendant was necessarily guilty; that the defendant, not Studer, was the initiator of the attack, and, thus, the perpetrator of a criminal act." Pet. App. 13a. The Ninth Circuit's interpretation of the buttons is built on several compound inferences, *none* of which are reflected by the record. These include: that any juror in fact saw the buttons at all; that any juror recognized who was depicted in the buttons (no non-autopsy photos of Tom Studer were introduced at trial); that any juror knew the spectators wearing the buttons had an affiliation with Studer (none of the three testified at trial); that anything about the three spectators suggested they had firsthand knowledge of the crime; and that the image depicted on the buttons depicted Studer in any particular light, let alone "represented him as the innocent party." See Pet.

App. 13a. Indeed, the number of unknown circumstances on this record makes even more varied the universe of available inferences to be drawn from a button bearing only a photo.

Even assuming the Ninth Circuit's detailed "message" were plausible, however, it matters little in the equation. Pet. App. 26a. One plausible inference does not invalidate other equally reasonable inferences. That is, the only relevant point is that the state's assessment of the buttons *was* a reasonable one. Pet. App. 26a; see *Woodford* v. *Visciotti*, 537 U.S. at 26-27 (Ninth Circuit's conclusion "perhaps" correct, but state court's conclusion was not objectively unreasonable); *Lockyer* v. *Andrade*, 538 U.S. at 75 (federal court's "firm conviction" that state decision was erroneous not sufficient; state decision must be objectively unreasonable); cf. *Collins* v. *Rice*, 126 S. Ct. 969, 975-76 (2006) ("Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination."); *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 647 (1974) ("a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations").

As for the Ninth Circuit's criticism that the state court did not look "beyond the general sentiment" of the buttons, Pet. App. 14a, there is nothing to support it. That no offending "message" was found does not mean the state court did not diligently consider and analyze all of the circumstances. Rather, the state court simply found there was no "message" beyond the general sentiment of the Studer family's grief. That conclusion, as discussed, was

objectively reasonable, regardless what the Ninth Circuit itself subjectively concluded.

The state appellate court's assessment of the buttons as not inherently prejudicial was not without other support. The trial judge, for example, found no prejudicial effect in the buttons. J.A. 4. The judge viewed the buttons, was present throughout the trial, and was in the best position to determine any potential prejudicial effect the buttons might have had. See *Arizona* v. *Washington*, 434 U.S. 497, 514 (1978); *United States* v. *Rutledge*, 40 F.3d 879, 884 (11th Cir. 1994); *State* v. *McNaught*, 238 Kan. at 581, 713 P.2d at 468. The jurors also were instructed before trial and again before deliberations to base their verdict only on the evidence introduced at trial, and not to be swayed by sympathy, passion, or prejudice. RT 434-35, 2072-73; see J.A. 4. It is presumed they followed those instructions. *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000). Last, beyond the instant case, there does not appear to be any decision reversing a judgment on the basis of spectators wearing buttons bearing photographs of a victim. See *People* v. *Houston*, 130 Cal. App. 4th at 309-16, 29 Cal. Rptr. 3d at 842-52 & n.9; *State* v. *Lord*, 128 Wash. App. at 219-23, 114 P.3d at 1242-45; *Johnson* v. *Commonwealth*, 259 Va. at 675-76, 529 S.E.2d at 781-82; *Cagle* v. *State*, 6 S.W.3d at 801-03; *Nguyen* v. *State*, 977 S.W.2d at 457; *State* v. *Speed*, 265 Kan. at 47-48, 961 P.2d at 29-30; *Kenyon* v. *State*, 58 Ark. App. at 26-35, 946 S.W.2d at 706-11; *People* v. *King*, 215 Mich. App. at 303-05, 544 N.W.2d at 768; *State* v. *Braxton*, 344 N.C. at 709-10, 477 S.E.2d at 176-77; *Mitchell* v. *State*, 884 P.2d at 1196; *State* v. *Bradford*, 254 Kan. at 141-42, 864 P.2d at 686-87; see also *In re Woods*, 154 Wash. at 416-18, 114 P.3d at 616-17 (spectators wore ribbons); *Buckner* v. *State*, 714 So. 2d at 388-89

(spectators held photos of victim); *State* v. *Nelson*, 705 So. 2d at 763 (T-shirts with victim's photo); *Pachl* v. *Zenon*, 145 Or. App. at 353-61, 929 P.2d at 1090-95 (Citizen Crime Victims United (CCVU) buttons); *State* v. *McNaught*, 238 Kan. at 577-81, 713 P.2d at 466-68 (MADD, SADD buttons). But cf. *Norris* v. *Risley*, 918 F.2d at 829-30 (granting habeas relief where spectators wore "Women Against Rape" buttons); *State* v. *Franklin*, 174 W. Va. 469, 474-75, 327 S.E.2d 449, 454-55 (1985) (reversing where spectators wore MADD buttons).

In addressing respondent's claim, the state court was faced with two Supreme Court cases involving dissimilar facts, and a generally applicable due process standard, the contours of which are unclear. It was, therefore, entitled to extensive latitude in applying this Court's caselaw. The state court's conclusion that the challenged buttons here were not inherently prejudicial was well within that latitude. For the reasons discussed above, the Ninth Circuit erred on several levels in concluding otherwise.

B. The Ninth Circuit's Piecemeal Reading Of The State Court Opinion Denied It The Deference Mandated By AEDPA

The Ninth Circuit's tendentious reading of the state court's decision was illogical and disregarded AEDPA. Even if the state court imprecisely used this Court's language in addressing respondent's claim, the state court neither acted contrary to nor unreasonably applied this Court's precedents in doing so, or in reaching its conclusion.

At the outset of addressing respondent's due process claim, the state court set forth the correct standard for

evaluating the claim, and identified this Court's most closely applicable case, *Holbrook* v. *Flynn*, 475 U.S. 560. Pet. App. 9a; see Pet. App. 74a-75a. The state court found the "simple photograph" of the victim on the buttons "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member." Pet. App. 75a. The state court further concluded, "While we consider the wearing of photographs of victims in a courtroom *to be an 'impermissible factor coming into play,'* the practice of which should be discouraged, *we do not believe the buttons in this case branded defendant 'with an unmistakable mark of guilt' in the eyes of the jurors.*" Pet. App. 75a (quoting *Holbrook* v. *Flynn*, 475 U.S. at 570-71) (emphasis added).

Seizing on that last sentence, the Ninth Circuit ascribed to the state court a finding not merely of an "unacceptable risk" of "impermissible factors coming into play," but a finding that an "impermissible factor" *had* come into play, and thus that inherent prejudice had been established. Pet. App. 10a-11a; see *Estelle* v. *Williams*, 425 U.S. at 505. Once the state court implicitly found inherent prejudice, the Ninth Circuit reasoned, the state court ruled "contrary to" and "unreasonably applied" this Court's precedent by "requiring" respondent also to show that the buttons had "branded" him with an unmistakable mark of guilt. Pet. App. 10a. The Ninth Circuit's reasoning is flawed on many levels.

Formulary or verbatim statements of an applicable constitutional standard need not be recited by a state court for its judgment to withstand scrutiny under 28 U.S.C. § 2254(d)(1). *Early* v. *Packer*, 537 U.S. 3, 9 (2002) (per curiam). Indeed, shorthand or even imprecise recitations of an applicable standard will not invalidate a state

court's decision so long as the "fair import" of the decision is that the correct standard was applied. *Woodford* v. *Visciotti*, 537 U.S. at 24; *Early*, 537 U.S. at 9. To conclude otherwise would be inconsistent with the presumption that state courts are "fully qualified to identify constitutional error and evaluate its prejudicial effect," *Brecht* v. *Abrahamson*, 507 U.S. 619, 636 (1993), as well as § 2254(d)'s "'highly deferential standard for evaluating state-court rulings,'" which "demands that state court decisions be given the benefit of the doubt," *Visciotti*, 537 U.S. at 24 (quoting *Lindh* v. *Murphy*, 521 U.S. at 333).

The Ninth Circuit disregarded these prescriptions in holding that the state court's decision was both "contrary to" and involved an "unreasonable application" of this Court's precedent. Pet. App. 10a-14a. According to the Ninth Circuit, the state court "imposed an additional and unduly burdensome requirement" on respondent by "demanding that the challenged practice cause the 'brand[ing]' of the defendant with an unmistakable mark of guilt[ ]'—even though the *Williams* test for inherent prejudice had already been met." Pet. App. 10a.

The context of the state court's language forecloses the Ninth Circuit's interpretation. First, as noted, the state court precisely recited the correct standard at the outset of addressing respondent's claim. Pet. App. 74a. Second, the state court *contrasted Norris*, which had found constitutional error, and distinguished the buttons here as "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member." Pet. App. 74a-75a. The state court surely did not intend to suggest that a display of "normal grief" establishes inherent prejudice. Third, the state court indicated

it was distinguishing between the "wearing of photographs of victims in a courtroom" *generally* as constituting an impermissible factor, versus "the buttons in this case" *specifically* as not "branding" respondent. See Pet. App. 75a. Fourth, while the state court considered "the wearing of photographs of victims in a courtroom" to be "an 'impermissible factor coming into play,'" it immediately followed that statement with the admonition that such a practice "should be discouraged." Pet. App. 75a; see also Pet. App. 49a-50a ("allowing the buttons was arguably not a prudent decision by the trial judge" (district court decision)). Had the state court intended to announce that the buttons in this case were inherently prejudicial, it would not have simply "discouraged" their use. See Pet. App. 75a. Last, the state court found that the buttons did not "brand" respondent with an "'unmistakable mark of guilt' in the eyes of the jurors." Pet. App. 75a (quoting *Holbrook* v. *Flynn*, 475 U.S. at 570-71). In *Flynn*, this Court itself, quoting from Justice Brennan's dissent in *Estelle* v. *Williams*, 425 U.S. at 518, used that very same language in concluding that inherent prejudice had not been established. *Flynn*, 475 U.S. at 571. The state court's use of this same phrase, which is unmistakably associated with the *absence* of inherent prejudice, is utterly inconsistent with the Ninth Circuit's conclusion that the state court implicitly found that the display of the buttons was in fact inherently prejudicial. Each of these aspects of the state court's decision, especially when the state court is given the "benefit of the doubt," *Woodford* v. *Visciotti*, 537 U.S. at 24, renders the Ninth Circuit's interpretation of the state decision untenable.

Equally unsound is the Ninth Circuit's conclusion that the state court imposed an "additional and unduly burdensome

requirement" on respondent by concluding that the buttons had not "branded him with an unmistakable mark of guilt." Pet. App. 10a. The Ninth Circuit's conclusion rests, again, on the faulty premise that the state court had *found* the buttons inherently prejudicial. Pet. App. 10a. The premise makes little sense under even the Ninth Circuit's own caselaw. The Ninth Circuit held the state court, by concluding that respondent had not been "branded," had imposed an additional and thus necessarily *different* requirement from requiring him to show an "impermissible factor" had come into play. Pet. App. 11a & n.2. The Ninth Circuit acknowledged, however, that it considered these tests *alternatives* to one another. Pet. App. 12a n.3 (citing *Williams* v. *Woodford*, 384 F.3d 567, 588 (9th Cir. 2004)). Indeed, federal and state courts alike have freely interchanged *Flynn*'s "branding" and "impermissible factor" language in this context. See, e.g., *Coy* v. *Iowa*, 487 U.S. 1012, 1034-35 (1988) (Blackmun, J., dissenting); *Hill* v. *Ozmint*, 339 F.3d 187, 200 & n.15 (4th Cir. 2003); *United States* v. *Olvera*, 30 F.3d 1195, 1197 (9th Cir. 1994); *United States* v. *Milner*, 962 F.2d 908, 915 (9th Cir. 1992); *Morgan* v. *Aispuro*, 946 F.2d 1462, 1465 (9th Cir. 1991); *Bell* v. *True*, 413 F. Supp. 2d 657, 720-21 (W.D. Va. 2006); *State* v. *Wilson*, 406 N.W.2d 442, 449 (Iowa 1987); *Marx* v. *State*, 987 S.W.2d 577, 581 (Tex. Crim. App. 1999); see also *United States* v. *Harris*, 703 F.2d 508, 512 (11th Cir. 1983) ("prison garb . . . clothes him with an unmistakable mark of guilt"); *Howard* v. *State*, 941 S.W.2d 102, 117 (Tex. Crim. App. 1996) ("reasonable probability that the conduct or expression interfered with the jury's verdict" "essentially interchangeable" with *Flynn*'s "unacceptable risk of impermissible factors coming into play"). The Ninth Circuit, however, seemingly viewed *Flynn*'s "branding" language as an alternative test when used by the Ninth

Circuit, but an additional and different test when used by the California courts. See Pet. App. 11a-12a & nn.2-3. Petitioner's point is not that *Flynn*'s "branding" language and "impermissible factor" language are synonymous, but rather that the Ninth Circuit's reasoning is unsound and explicable only as the "readiness to attribute error" this Court has condemned. See *Middleton* v. *McNeil*, 541 U.S. 433, 438 (2004); *Woodford* v. *Visciotti*, 537 U.S. at 24.

Even accepting the Ninth Circuit's reasoning and precedent, however, its conclusion is incorrect. If, as the Ninth Circuit believed, the state court of appeal found inherent prejudice using the "impermissible factor" language of *Flynn*, the fact remains the state court found *no* inherent prejudice using the "branding" language of *Flynn*. Pet. App. 75a. Where such perceived ambiguities arise, AEDPA commands that state decisions be given the benefit of the doubt. *Woodford* v. *Visciotti*, 537 U.S. at 24. Here, that benefit compels the conclusion that the state court, arguably imprecisely, used the "impermissible factor" language to indicate its disapproval of the use of buttons generally, but found no inherent prejudice in this case, using *Flynn*'s "branding" language. Pet. App. 75a.

Under *Flynn*, the "only question" a state court need answer under these circumstances is whether the challenged courtroom practice "was so inherently prejudicial that respondent was thereby denied his constitutional right to a fair trial." *Holbrook* v. *Flynn*, 475 U.S. at 570. The "fair import" of the state court's decision, particularly viewed through the deferential lens of § 2254(d)(1), is that *Flynn*'s question was asked and answered. The best interpretation of the state court's opinion here is that explained by dissenting Judge Thompson below: "[T]he state court's 'impermissible factor' comment is most

reasonably understood as reflecting that court's view that buttons bearing a victim's photograph should not be worn in a courtroom." Pet. App. 17a. "[T]he state court's additional comment that the buttons did not 'brand[] defendant "with an unmistakable mark of guilt'" is most reasonably understood as an explanation that the buttons were not 'so inherently prejudicial as to pose an unacceptable threat to [the] right to a fair trial.'" Pet. App. 18a (quoting *Holbrook* v. *Flynn*, 475 U.S. at 572) (brackets in *Musladin*); cf. Pet. App. 29a-30a ("Under *Flynn*, . . . it is possible to have a situation that is 'inherently prejudicial' but not '*so* inherently prejudicial as to pose an unacceptable threat to a defendant's right to a fair trial.'").

C. The Ninth Circuit's Conclusion That An Inherently Prejudicial Courtroom Practice Constitutes Structural Error Is Contrary To This Court's Precedent

In addition to its disregard of AEDPA, the Ninth Circuit misapplied this Court's precedent on harmless error. Contrary to this Court's jurisprudence, the Ninth Circuit concluded that a showing of inherent prejudice under *Holbrook* v. *Flynn*, 475 U.S. 560, and *Estelle* v. *Williams*, 425 U.S. 501, requires automatic reversal, without any determination of prejudice.

As dissenting Judge Bea explained, the panel majority erroneously treated the presence of the three buttons at trial as structural error. Pet. App. 29a. The panel majority, it is true, did not expressly state that the alleged error was structural or reversible per se. The court held, nevertheless, that under *Flynn* and *Williams*, a finding of inherent prejudice ends the inquiry and "requires reversal." Pet. App. 10a; see also *id.* 11a n.1 ("As we held in *Norris*,

reversal is required if a defendant can prove *either* actual *or* inherent prejudice."), 12a ("a practice that brands a defendant as guilty would surely be sufficient to demonstrate 'inherent prejudice' and require reversal"). Consistent with that necessary conclusion of structural error, the court did not mention harmless error review or cite this Court's habeas corpus harmless error precedent, *Brecht* v. *Abrahamson*, 507 U.S. 619.

This Court has recognized that "most constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991) (citing examples). "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). Hence, the Court has found an error to be "structural," and thus subject to automatic reversal, only in a very narrow class of cases. *Neder* v. *United States*, 527 U.S. 1, 8 (1999). Examples include the complete denial of counsel, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); a biased trial judge, *Tumey* v. *Ohio*, 273 U.S. 510 (1927); racial discrimination in the selection of a grand jury, *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); denial of self-representation at trial, *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984); denial of a public trial, *Waller* v. *Georgia*, 467 U.S. 39 (1984); and a defective reasonable doubt instruction, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). *Neder*, 527 U.S. at 8. Such errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Id.* at 8-9 (quoting *Rose*, 478 U.S. at 577-78).

Deck v. *Missouri*, 544 U.S. 622, explained that the presence of an "inherently prejudicial" courtroom practice —in that case shackling—may relieve the defendant from proving *actual* prejudice to establish a due process violation. 544 U.S. at 635. The Court did not, however, suggest such an error was structural, but instead expressly stated that it was subject to review for harmlessness. *Id.* (citing *Chapman* v. *California*, 386 U.S. 18, 24 (1967)); see also *Estelle* v. *Williams*, 425 U.S. at 506-08 (suggesting compelled wearing of prison garb subject to review for harmlessness); *United States* v. *Harris*, 703 F.2d 508, 512 (11th Cir. 1983) (reviewing for harmlessness where defendant compelled to wear prison garb); *Young* v. *Callahan*, 700 F.2d 32, 37 (1st Cir. 1983) (reviewing for harmlessness where defendant compelled to sit in prisoner's dock during trial instead of at counsel's table); Pet. App. 29a (interpreting *Williams* to authorize harmless error review). In the context of § 2254(d)(1) review, this means that, even if the defendant establishes an inherently prejudicial courtroom practice took place during his trial, the federal court may not grant habeas relief without determining whether the constitutional error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht* v. *Abrahamson*, 507 U.S. at 638 (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)).

The instant case demonstrates the need for harmless error review where an allegedly inherently prejudicial courtroom practice has been established. The buttons have never been placed in evidence. There is no indication how the photo on the buttons depicted Tom Studer. No court has seen the buttons except the state trial judge, who, in the best position to assess the buttons' effect, found no prejudice.

J.A. 4. Perhaps most significantly, no evidence was adduced from any of respondent's jurors. Beyond respondent's mother's declaration and trial attorney's unsworn statement that the Studer family sat near the jury box while wearing the buttons, J.A. 6, 8, there is no evidence that any of respondent's jurors saw the buttons, let alone recognized what or whom they depicted.

In sum, even if respondent can satisfy § 2254(d)(1), the alleged due process error remains subject to review for harmless error to determine whether the buttons had "substantial and injurious effect or influence in determining the jury's verdict." See *Brecht* v. *Abrahamson*, 507 U.S. at 638. The court of appeals erred in concluding otherwise.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Dated: June 20, 2006

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In The

Supreme Court of the United States

THOMAS L. CAREY, Warden,

Petitioner,

v.

MATHEW G. MUSLADIN,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

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STATEMENT OF THE CASE

I. Statement of Facts

A. The Trial

On May 13, 1994, Tom Studer ("Studer") was shot and killed. Nearly eighteen months later Mathew Musladin ("Musladin") was tried for the murder of Studer. The central question to be answered at this trial was whether Musladin acted in self defense when he shot and killed Studer. In this trial, both Musladin and Studer claimed to be the "innocent" actor and one of them – Studer – was unfairly bolstered by buttons depicting his image that were pinned to the chests of a group of grieving survivors seated behind the prosecutor. Much of the evidence was in dispute, and other evidence was never presented to the jury.

In May of 1994, Musladin had been estranged from his wife, Pamela Musladin, but was permitted to take their three-year-old son, Garrick, to his home for weekend visits. RT 1681.[1] On May 13, 1994, Musladin went to Pamela's home to collect his son for one of those visits. Pamela was at the house, as was her fiancé, Tom Studer. Musladin retrieved Garrick and placed him in his car. Pamela came out of the garage door and approached the car. RT 1694. Musladin complained of Garrick's dirty pull-ups and asked for the overnight bag. Pamela told Musladin she would get it and went back into the house for ten to fifteen minutes before returning to the car with

[1] "JA II" refers to Volume II of the Joint Appendix. "PA" refers to the appendix submitted with the petition for writ of certiorari "RT" refers to Reporter's Transcript of Trial. "JA" refers to Volume I of the Joint Appendix filed by the parties.

the bag. RT 1699. Musladin told her that he was being sued by two credit-card companies for purchases she had made. RT 1699. Rather than discuss the issue, Pamela went over to Musladin and tried to put her head on his chest. RT 1699.

Musladin believed Pamela was under the influence of methamphetamine at the time. Pamela had a history of methamphetamine abuse, and Musladin testified that he could recognize her reaction to the drug. RT 1741-44. Although Pamela later testified that she was not under the influence that day, police found cut methamphetamine in the house, next to a television. RT 1638-39. Moreover, at the time of his death, Studer had 1.55 micrograms per milliliter of methamphetamine in his system. RT 1492. A third person present at the house that day also had been using methamphetamine: Michael Albaugh, Pamela's brother and roommate. RT 1599.

Musladin became exasperated with Pamela's behavior and pushed her away from him; he called her move "manipulating." RT 1699. Pamela retreated three or four steps, fell to the ground and began screaming, "Help, help, he's hurting me." RT 1699. Musladin heard some people inside the house say, "Get him, let's get him," and "There he is, kill the fucking bastard." RT 1701-02. At this time, Musladin was still near his son at the passenger side of the car. He reached below the seat and grabbed his gun case, unlocked it, and unlatched it. RT 1702. He did not take the gun out of its case.

Musladin turned, looked into the garage, and saw several people coming toward him – including a nearly 300-pound Michael Albaugh. Albaugh had a machete in his

hand and said something that sounded to Musladin like, "I'm going to do you." RT 1703.

Musladin turned toward the car once again and grabbed his gun from the gun case. RT 1703. As he was grabbing the gun, he heard Pamela say, "Get Garrick first." RT 1703. Musladin loaded the gun and turned around. He heard Michael Albaugh yell, "He's got a gun." RT 1704. Musladin saw two other people – someone in the garage and someone else near Pamela.

He then saw Albaugh and the unidentified person next to Pamela run away. RT 1704. Pamela remained sitting on the ground; the person who had been in the garage did not run. RT 1705. Musladin saw that the person in the garage had a gun, so he fired into the garage. RT 1705.

Musladin thought he may have hit the person in the garage because the person's upper torso jerked. RT 1705. Musladin testified that he wanted to get away from his son, so he walked away from his car and took approximately three to four steps toward the garage. RT 1706. He heard a loud banging noise from the right corner of the garage. RT 1706. He saw something move and shot at the location of the sound. RT 1706. At some point, Pamela ran into the garage. RT 1706.

Studer was shot in the back of the right shoulder and in the head. RT 511-12, 625-629. The forensic evidence revealed that both shots were fired from a distance. RT 1402-1407 Both prosecution and defense experts agreed that the mortal wound, the shot to the head, was the result of a bullet that had ricocheted. RT 629-31, 721, 723-32, 846-47, 905-08, 927, 1188, 1370-73.

Musladin argued at trial that he had acted in self-defense and in support of this theory sought to introduce evidence regarding his knowledge and personal experience of prior violence and drug use at his estranged wife's home. RT 1874-83. This evidence included prior threats against Musladin involving various weapons, including a crossbow and a broken beer bottle. RT 1881. Musladin also witnessed individuals at the residence involved in physical altercations. RT 1882. At trial, Musladin argued that this evidence was relevant to his state of mind at the time of the incident. RT 1874-79.

In addition, Musladin offered rebuttal evidence. At trial, the prosecutor claimed that Musladin was lying about having acted in self-defense because he never told police after his arrest about the threatening actions of the people in the house. Musladin attempted to counter this evidence with testimony from his father, explaining that Musladin had called him soon after his arrest and had told him about the threats. The trial court excluded all of this evidence. RT 1606-08, 1878, 1880, 1883-85.

Tom Studer's family attended the trial. At least three members of Studer's family were present every day of the trial. JA 3-4 Each member of the Studer family wore a button throughout the trial. The buttons were about two to four inches in diameter and bore a photograph of Studer. Studer's family members sat immediately behind the prosecutor, adjacent to the jury. JA 6-8. Before opening statements, defense counsel asked the trial court to preclude Studer's family from wearing the photo badges. JA 3-4. The trial court denied this motion. JA 3-4.

The jury trial began on October 16, 1995. The jury began deliberating on October 31, 1995. RT 1460. On

November 1, 1995, Musladin was convicted of all counts – first-degree murder, attempted murder, first-degree burglary and assault with a firearm. PA 33a, 55a.

B. The State Court of Appeal

Musladin appealed his conviction and argued that the buttons depicting Studer violated his constitutional right to a fair trial. The California Court of Appeal rejected this argument and affirmed the conviction. PA 55a-78a. In reaching this conclusion the state court adjudicated the claim using *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986). The Court determined that the wearing of the button was itself an impermissible factor and thereafter required the defendant to prove that the wearing of the buttons marked him with an "unmistakable mark of guilt." PA 74a-75a. In adjudicating the claim, the st te court cited the controlling Supreme Court law in its decision and applied a rule with an additional requirement contrary to that Supreme Court law.

Musladin then filed a petition for a writ of habeas corpus with the California Supreme Court. JA 6-8. Notably, this petition permitted Musladin to supplement the record with further evidence regarding the buttons worn by Studer's family at trial. PA 6-8. The California Supreme Court denied the petition without comment. PA 81a.

C. The Federal Habeas Action

On June 5, 2000, Musladin filed a petition for writ of habeas corpus in the United States District Court for the

Northern District of California. JA 1. The district court issued an order to show cause on October 19, 2000, and the state filed an answer on May 14, 2001. JA 1. On August 16, 2001, Musladin filed a traverse.[2] JA 1. On May 14, 2003, the district court denied the petition for writ of habeas corpus in its entirety. PA 47a-50a.

On June 12, 2003, Musladin filed a notice of appeal and a motion for a Certificate of Appealability ("COA"). JA 1. On September 2, 2003, the district court granted Petitioner's Motion for a Certificate of Appealability as to all but the last claim – whether Petitioner was denied the effective assistance of counsel when his counsel unreasonably failed to present expert testimony that the entry path of the first bullet was not itself fatally inconsistent with the self-defense theory. JA 1.

On April 8, 2005, a divided panel of the Court of Appeals reversed the district court and granted the writ. PA 1a-18a. The court held that Musladin's right to a fair trial was prejudiced when the trial court allowed Studer's family to wear buttons emblazoned with a picture of Studer during the trial and that the California Court of Appeal's decision to the contrary was an objectively unreasonable application of clearly established federal law. The Ninth Circuit therefore determined that habeas relief was warranted under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

The court of appeals began its analysis by first identifying the "clearly established Federal law" as derived from two cases from this Court *Williams*, 425 U.S. 501 and

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[2] The District Court appointed Assistant Federal Public Defender David W. Fermino to represent Musladin after the filing of the traverse.

Holbrook v. Flynn, 475 U.S. 560 (1986). *Musladin v. Lamarque*, 427 F.3d 653, 656-57 (9th Cir. 2005). From these cases, the court extracted the rule to be applied to Musladin's claim: "[C]ertain practices attendant to the conduct of a trial can create such an 'unacceptable risk of impermissible factors coming into play,' as to be 'inherently prejudicial' to a criminal defendant." *Id.* at 656 (citing *Williams* and *Flynn*). It then discussed the facts of these two cases and their application of the rule. *Id.* at 656-57. The Court of Appeals also discussed its own prior case, *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990) as a tool for "assess[ing] . . . the meaning of the federal law that was clearly established by *Williams* and *Flynn* and whether the state court's application of that law in the case before [it was] objectively unreasonable." *Id.* at 657.

The Court of Appeals compared the rule of *Williams* and *Flynn* to the rule applied by the state court in Musladin's case. *Id.* at 658. The state court's decision was contrary to the rule of *Williams* and *Flynn*, the Ninth Circuit held, because it required that the challenged practice not only constitute an unacceptable risk of an impermissible factor coming into play but also that it "brand" the defendant with an "unmistakable mark of guilt." This additional test imposes too high and too unreasonable a burden on defendants and is contrary to established Supreme Court law. *Id.* at 659; *see Williams*, 529 U.S. at 393-99 (finding state-court decision contrary to Supreme Court precedent because it required petitioner to make additional showing beyond what Supreme Court rule required). The court of appeals then discussed this Court's use of the phrase "branding with an unmistakable mark of guilt" in *Williams* and *Flynn* to show that it was not part of the Court's rule and should not have been a

part of the test applied by the state court to Musladin's claim. *Id.* at 659-60 & n.2.

In light of "the specific message that the button conveys in light of the particular facts and issues before the jury," the court of appeals concluded that "a reasonable jurist would be compelled to conclude that the buttons worn by Studer's family members conveyed the message that the defendant was guilty." *Id.* at 661.

The Ninth Circuit thus held that the California Court of Appeal decision was both contrary to and an unreasonable application of this Court's precedents. *Id.* It held that the state court unreasonably applied a rule contrary to the rule set forth in *Flynn* when, despite its finding that the buttons were an "impermissible factor," it denied relief because the buttons did not brand Musladin with "an unmistakable mark of guilt." *Id.*

On October 21, 2005, the court of appeals denied the State of California's Petition for Rehearing and Rehearing En Banc. PA 19a. The State filed a petition for writ of certiorari, and certiorari was granted on April 17, 2006. *Carey v. Musladin*, 126 S. Ct. 179 (mem.) (2006).

SUMMARY OF THE ARGUMENT

The trial of Mathew Musladin took place more than seventeen months following the death of Tom Studer. When the Studer family came to court with the buttons prominently displayed they were not mourning: they were sending a message. In a trial where the defense was self-defense the buttons argued to the jury that the wearers'

"loss" was at the hands of Musladin. Family members wearing buttons with a photograph of the decedent, depicted in a manner inconsistent with the reality of his appearance on the day in question, are not spectators "exhibiting the normal grief occasioned by the loss of a family member." They are advocates.

The Fourteenth Amendment incorporates the essence of the Sixth Amendment right to be tried "by a panel of impartial, 'indifferent' jurors [whose] verdict must be based upon the evidence developed at trial." *Irwin v. Dowd*, 366 U.S. 717, 722 (1961). Due process requires courts to safeguard against "the intrusion of factors into the trial process that tend to subvert its purpose." *Estes v. Texas*, 381 U.S. 532, 560 (1965) (Warren, C.J. concurring). The buttons worn by the Studer family worked to undermine the presumption of innocence in this case and in effect militated against the fair and impartial assessment of Musladin's guilt. When the consequence of a courtroom practice is that an "unacceptable risk is presented of impermissible factors coming into play," there is inherent prejudice" to a defendant's constitutional right to a fair trial and reversal is required. *Flynn*, 475 U.S. at 570.

In its discussion of the standards applied under AEDPA, the court of appeals acknowledged that "AEDPA limits the source of clearly established federal law to Supreme Court cases." *Musladin v. Lamarque*, 427 F.3d 653, 655 (9th Cir. 2005). It also noted that federal appellate-court decisions have "persuasive value in our effort to determine whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and what law is 'clearly established.'" *Id.* at 655 (ellipses and some quotation marks omitted).

The court determined that [t]he underlying federal law in this case – that certain practices attendant to the conduct of a trial can create such an 'unacceptable risk of impermissible factors coming into play,' as to be 'inherently prejudicial' to a criminal defendant – was clearly established by the Supreme Court in *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560, 656 (1986).

The court of appeals then found that the state-court decision was "objectively unreasonable both in its ultimate conclusion and in the rationale it employed in denying Musladin's appeal." *Id.* The court below determined that the state-court decision was both contrary to and an unreasonable application of *Williams* and *Flynn* because it "impos[ed] an additional 'branding' requirement" that neither of those cases required. *Id.* at 659-60; *see also id.* at 661 (state court's application of Supreme Court law "was contrary to the Court's established rule of law and was objectively unreasonable"). In reaching this conclusion, the court of appeals in no way relied on *Norris*; it mentioned *Norris* in this section only in a footnote. *Id.* at 658-69 & n.1.

The state seizes on the brief reference to *Norris* in the opinion of the court below in its unsuccessful attempt to elevate passing reference to "wholesale reliance." Rhetoric cannot transform what is plain from the face of the opinion of the court below – the same conclusion could have been reached with or without reference to *Norris*. *Norris* is a red-herring.

To the extent that Petitioner now contends that the *Williams/Flynn* principle is not clearly established because

this Court has never applied it in a case where the challenged courtroom procedure involved spectators wearing buttons with a photograph of the person killed, Petitioner has waived this argument, and this Court's cases have foreclosed Petitioner's reading of § 2254(d)(1).

Assuming, arguendo, that Petitioner did not waive this argument, it is wrong on the merits. The Court already has held that it need not have applied the principle in a case factually on point for the principle to be "clearly established" under § 2254(d)(1). "Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63 (2003). As the Court has explained, only one of the three grounds on which relief may be granted under § 2254(d)(1) calls for facts that are "materially indistinguishable" from those in a case in which the Court applied the principle. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). Moreover, § 2254(d)(1) explicitly allows for the granting of relief when a state court has "unreasonabl[y] appl[ied]" a Supreme Court principle.

As Petitioner noted in its petition for certiorari, the *Williams/Flynn* principle is a broad rule of due process. When the Supreme Court principle at issue is general, its "meaning must emerge in application over the course of time." *Yarborough v. Alvarado*, 541 U.S. 652 (2000). Such general principles may be applied in a variety of contexts without creating a new rule or ceasing to be clearly established. *See Williams*, 529 U.S. at 382 (Stevens, J.) (application of general rule rarely requires creation of new rule

under *Teague*, quoting *Wright v. West*, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring)).

ARGUMENT

I. The Framework of Habeas Corpus Review Under 28 U.S.C. § 2254

As the State's Brief on the Merits tends to conflate the distinct analyses a habeas court must undertake pursuant to 28 U.S.C. § 2254(d)(1), a discussion of the general framework of federal habeas review is appropriate. Under § 2254(d)(1), a federal court may grant relief where the underlying state-court decision on the merits of the habeas petitioner's claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 404-05.

The framework for merits review of a constitutional claim established by § 2254 as a whole indicates that the first question for a habeas court is whether the petitioner has established the existence of a constitutional violation under § 2254(a). If that question is answered in the negative, then the court need not concern itself with § 2254(d)'s limitation on the power to grant relief, because there is no error to remedy. Where, on the other hand, the federal court does find a constitutional violation such that § 2254(a) has been satisfied, the court must concern itself with whether it is authorized to remedy that violation within the meaning of § 2254(d). At this point, § 2254(d) requires the federal court to examine the state court's decision for meaningful defects in rule selection or application (§ 2254(d)(1)) or fact determination (§ 2254(d)(2)).

Under § 2254(d)(1), the rules a state court is obligated to identify and apply are those which have been "clearly established . . . by the Supreme Court."

This Court has identified two ways in which a state-court decision will be deemed contrary to its precedents. "A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Id.* at 405. "A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.*

Likewise, this Court has identified two ways in which a state-court's decision will violate the "unreasonable application" clause of § 2254(d)(1). First, a decision involves an unreasonable application of clearly established law where "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* 413; *see also id.* at 407-08. In addition, "[a] state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000) (plurality opinion); *Williams*, 529 U.S. at 407. To merit habeas relief, the state court's application of clearly established law must be objectively unreasonable. *Bell v. Cone*, 535 U.S. 685, 694 (2002); *Lockyer*, 529 U.S. at 75.

Although the State attempts to confound the multiple, distinct analyses prescribed by § 2254(d)(1) and this Court's precedent, a careful review of the court of appeals' opinion in the present case demonstrates its faithful application of the foregoing principles and its adherence to this Court's authority governing the review of habeas corpus petitions under AEDPA.

II. The Court of Appeals Correctly Identified Clearly Established Supreme Court Law and Correctly Determined that the State Court's Decision Was an Objectively Unreasonable Application of that Law

The gravamen of the State's complaint is that the court of appeals improperly derived "clearly established" federal law from its own precedent – *Norris*, 918 F.2d 828 – rather than from this Court's authority. That complaint is untrue.

There is nothing in the court of appeals' analysis that was inappropriate or unusual or that violated the precepts of AEDPA. The court of appeals' opinion makes quite clear that the clearly established federal law against which it measured the state court's decision was *Williams* and *Flynn*, and that the result would have been precisely the same if the Ninth Circuit had never even decided *Norris*. The opinion makes equally clear that the court of appeals use of *Norris* in its analysis was no different from the way in which other federal courts of appeals have used lower federal-court precedent in other habeas cases governed by § 2254(d)(1). Thus, the real – and only – issue in this case is whether the court of appeals was correct when it held that the state court's analysis was contrary to, and involved an unreasonable application of, *Williams* and

Flynn. As discussed below, the court of appeals was correct.

A. The Court of Appeals Did Not Use Its Precedent To Create, Neglect, Alter, or Otherwise Expand the Rule of *Williams* and *Flynn*

As this Court has noted, the "clearly established" standard is not meant to be complicated: "In most situations, the task of determining what we have clearly established will be straightforward." *Lockyer*, 538 U.S. at 72. This Court has identified four requirements for a principle to be "clearly established" as defined in § 2254(d)(1). First, the principle must be based on a decision or decisions of this Court, not of any lower court. *Williams*, 529 at 412. Second, the principle must derive from the holdings, not the dicta, of this Court's decisions. *Id*. Third, the principle must have been established by the Court "at the time of the relevant state-court decision." *Id*. Fourth, the principle must be grounded in the federal Constitution and thus apply to state-court proceedings. *Cf. Early v. Packer*, 537 U.S. 3, 10 (2002) (rejecting habeas court's conclusion that state-court decision was contrary to clearly established law in part because Supreme Court cases upon which court relied stated rule applicable only to federal-court proceedings). In short, "'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer*, 538 U.S. at 71-72.

In its decision below, the court of appeals correctly identified this Court's decisions in *Williams*, 425 U.S. 501

and *Flynn*, 475 U.S. 560 as providing the clearly established principle applicable to this case. It also properly followed the guidance of this Court in determining the clearly established general principle those cases stand for, namely that "certain practices attendant to the conduct of a trial can create 'such an 'unacceptable risk of impermissible factors coming into play,' as to be 'inherently prejudicial' to a criminal defendant." *Musladin*, 427 F.3d 653, 656 (9th Cir. 2005) (citing *Flynn*, 475 U.S. at 570).

Indeed, the State agrees that the *Williams/Flynn* principle is a clearly established "general rule."[3] That the principle of *Williams/Flynn* is a general rule, however, does nothing to diminish the availability of habeas relief. When the Supreme Court principle at issue is a general rule, its "meaning must emerge in application over the course of time." *Alvarado*, 541 U.S. at 664. Such general principles may be applied in a variety of contexts without creating a new rule or ceasing to be clearly established. *See Williams*, 529 U.S. at 382 (Stevens, J.) (application of general rule rarely requires creation of new rule under *Teague*) (quoting *Wright v. West*, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring)). Moreover, "[s]ection 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer*, 538 U.S. at 76.

The court of appeals therefore properly considered the persuasive reasoning of *Norris*, in which it held that "Women Against Rape" buttons worn during a jury trial were inherently prejudicial under *Williams* and *Flynn*, in

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[3] Pet'r Br. 10, 12, 15-18, 20.

assessing the meaning of this general rule that has emerged in application over the course of time. The State claims, however, that rather than follow *Williams* and *Flynn*, the Ninth Circuit "used" its decision in *Norris* to "determine" and "define" what was clearly established federal law. Pet'r Br. 14-16. The State is incorrect.

To the extent that the Ninth Circuit used its prior decision in *Norris* to "determine" whether this Court established a clear rule in *Flynn* and *Williams*, the State is correct – as is explained below, there is nothing wrong with the circuit looking to prior case law to ascertain or "determine" whether courts are in agreement that this Court has established a clear rule of law on a given subject. Insofar as *Norris* recognized that this Court had in fact set forth such a rule relating to potentially prejudicial courtroom practices in *Williams* and *Flynn*, the Ninth Circuit did nothing improper when it looked to *Norris* to help "determine" what the state of the law with regard to such courtroom practices happened to be.

But the State is clearly arguing something quite different when it contends that in employing the terms "define" and "determine," the court of appeals actually used *Norris* to either create, neglect, expand upon, or otherwise alter the *Williams*/*Flynn* rule that had been clearly established by this Court. This recharacterization (or rather, mischaracterization) is crucial for the State, because the role permitted for circuit authority changes depending upon the prong of the § 2254(d)(1) analysis. AEDPA's prohibition on the use of circuit authority to expand or alter a rule during the "clearly established" analysis is undisputed, while it is equally clear that circuit authority may play an appropriate, limited role in the "unreasonable application" analysis. Thus, a fundamental

question is how the court of appeals actually treated *Norris* in its decision below.

A fair and careful reading of the decision below reveals that the Ninth Circuit never used its decision in *Norris* to change or extend this Court's clearly established law. Rather, the court below undertook an analysis of the legal and factual issues before it in a manner that this Court has expressly approved. Of course, the decisions of this Court alone are the only proper source for federal law under § 2254(d)(1). The Ninth Circuit recognized as much below: "AEDPA limits the source of clearly-established federal law to Supreme Court cases." This does not mean, however, that state- or lower federal-court decisions play absolutely no role in the "clearly established" analysis. Several federal courts of appeals have recognized that non-Supreme Court authority may assist in analyzing whether there has been an unreasonable application of clearly established law or in confirming that this Court's decisions have in fact clearly created a rule of law. As the Ninth Circuit has previously stated:

> This does not mean that Ninth Circuit case law is never relevant to a habeas case after AEDPA. Our cases may be persuasive authority for purposes of determining whether a particular state court decision is an "unreasonable application" of Supreme Court law, and may also help us determine what law is "clearly established." See *MacFarlane v. Walter*, 179 F.3d 1131, 1139 (9th Cir. 1999) (looking to Ninth Circuit case law to confirm that Supreme Court case clearly establishes a legal rule).

Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000). *Accord Ouber v. Guarino*, 293 F.3d 19, 26 (1st Cir. 2002);

Serrano v. Fisher, 412 F.3d 292, 299 n.3 (2d Cir. 2005); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 885-91 (3d Cir. 1999) (en banc); *McCalvin v. Yukins*, 444 F.3d 713, 721 (6th Cir. 2006).

Nowhere in *Duhaime*, or in the court's decision below, does the Ninth Circuit hold that a prior circuit case can represent the source of clearly established law. Rather, prior decisions may confirm whether this Court has in fact created such clearly established law.

The State attempts to characterize the Ninth Circuit's decision as using its own precedent to alter this Court's clearly established law – or even create its own rule with respect to prejudicial courtroom behavior by spectators. The state's attempts to buttress this characterization by reference to the following statements in the lower court's opinion: (1) where the court noted that *Norris* had "persuasive value in an assessment of the meaning of the federal law that was clearly established by *Williams* and *Flynn*"; (2) where the court used *Norris* to determine whether the state court "misapplied" *Williams*; (3) where the court noted that *Norris* had persuasive weight "in determining the federal law as established by *Williams*"; and (4) where the court concluded that the state court was "objectively unreasonable in light of *Norris*." Pet'r Br. 16. From these statements, the State concludes that the Ninth Circuit used *Norris* – as opposed to this Court's holdings in *Flynn* and *Williams* – as the source of what it determined to be the clearly established federal law governing the case before it. *Id.*

The State's argument is misplaced. If one looks carefully at the context of the statements cited by the State, as well as the actual basis for the Ninth Circuit's decision, it is plain that the court of appeals recognized

that this Court – and this Court alone – established the governing legal principle in *Williams* and *Flynn*.

For example, in its analysis labeled, "Clearly Established Federal Law," the Ninth Circuit's first conclusion was that this Court's authority – *Williams* and *Flynn* – clearly established the underlying federal law in this case. *Musladin*, 427 F.3d at 655. That conclusion was unaffected by any subsequent reference to *Norris*. Indeed, before its first mention of *Norris*, the Ninth Circuit had already exhaustively discussed both *Williams* and *Flynn*, reported the facts of those decisions, and quoted, verbatim, the rule from those opinions. *Musladin*, 427 F.3d at 656-57.

Only after this extensive discussion of Supreme Court law in its "clearly established" analysis did the court of appeals turn to *Norris*. The court stated that *Norris* had persuasive value in a specific and a limited way for the "clearly established" analysis: *Norris*, explained the court of appeals, "has persuasive value in the assessment of the meaning of the federal law *that was clearly established* by *Williams* and *Flynn*." *Id.*

Thus, by the time the court of appeals finally turned to *Norris* in its "clearly established" analysis, the questions of whether the law was clearly established and the resolution of what that law was, were faits accomplis. As demanded by AEDPA, the court of appeals had considered this Court's authority, had identified the clearly established law, and had articulated the rule actually announced by this Court. A fair reading of the Ninth Circuit's analysis reveals that *Norris* played no role in determining the clearly established federal rule; at most, the court below recognized that *Norris* had applied this clearly

established law to analogous facts and thereby helped to give "meaning" to this Court's general *Williams/Flynn* rule in a similar factual context.

Similarly, when the court below stated that it had used *Norris* to "determine" federal law as established by *Williams*, its discussion was limited to noting the "striking factual similarities" between *Norris* and the facts of *Musladin*. *Id.* ("In determining whether a state court's decision involved an unreasonable application of clearly established federal law, it is appropriate to refer to decisions of the inferior federal courts in factually similar cases.") (citation omitted). The reasoning is sound in this, the last paragraph of the Ninth Circuit's "clearly established" analysis. The logic and analysis of a factually similar case will, of course, be more likely to be persuasive than a previous decision that is not on all fours. The court of appeals did not attempt to expand or alter the *Williams/Flynn* rule through its reference to *Norris*; rather, it merely uses *Norris* to show how, in a prior federal case that was factually analogous, the court had determined, using the reasoning of *Williams* and *Flynn*, that buttons worn by spectators in a courtroom could deny a defendant a fair trial.

There remain two other *Norris* references cited by the State. Both of these references, however, relate to the application of clearly established law to the facts of the case. Importantly, those references underscore how the Ninth Circuit actually used *Norris* – as persuasive reasoning on the issue of whether the state court had, as an objective matter, unreasonably applied this Court's rule to the facts before it. *See* discussion at Section III, *infra*. Nowhere in its brief does the State cite a single passage or statement from the decision below that indicates that the

Ninth Circuit created, neglected, altered, or expanded upon this Court's *Williams/Flynn* clearly established rule. Thus, the State's assertion that the court below "extended" clearly established federal law in an improper fashion is simply wrong. *See* Pet'r Br. 17.

Notwithstanding this fact, the State apparently contends that what the Ninth Circuit did below was "define" clearly established law, and that such an undertaking was improper; "if circuit or state precedent is necessary to define what law is clearly established, then such law is not clearly established by this Court." Pet'r Br. 17.

There are two answers to this assertion by the State. First, as described above nowhere does the court of appeals say that it was necessary to use *Norris* to define what was clearly established law; rather, the court used *Norris* because of its factual similarity, and because the state court of appeal relied on it. Second, the State plays a semantic game with the term "define" in an effort to mischaracterize what the court below did through its references to *Norris*. Whenever a court takes a general rule of law and applies it to a given set of facts, its decision will give further "definition" to the general rule, at least in some factual context. This is not improper because such an undertaking does not change the general rule. If, on the other hand, a circuit court takes a general rule and independently "defines" that rule to add elements to a test or create legal parameters for the rule where none exist, that would be improper. *See Alvarado*, 541 U.S. at 666. No one has suggested this is what the court of appeals did below.

As noted above, that a general rule must be examined by lower courts and applied to varying fact patterns does

not mean that the rule is not clearly established. *See, e.g.*, *Lockyer*, 538 U.S. at 76 ("Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced.") The State's implicit suggestion otherwise is mistaken. Pet'r Br. 17. As the State correctly notes, the "only 'rule' the court of appeals was permitted to consider as authority under § 2254(d)(1) was the general principle in *Flynn* and *Williams*. . . ." Pet'r Br. 17. The Ninth Circuit did precisely that below.

B. The Court of Appeals Properly Concluded that the State Court's Analysis Was Contrary to Clearly Established Federal Law

Because the court of appeals correctly identified the rule of law at issue here, and did not use its own authority to alter or expand upon that rule, the question becomes whether the state court below properly applied that rule to deny Musladin's claim. It did not. The state court's decision was contrary to federal law as clearly established by this Court in *Williams* and *Flynn*.

A state-court decision is contrary to this Court's clearly established precedent under § 2254(d)(1) "if the state court applies a rule that contradicts the governing law set forth in our cases." *Williams*, 529 U.S. at 405; *Lockyer*, 538 U.S. at 73. As discussed above, the State agrees that *Williams/Flynn* properly governs Musladin's claim and further acknowledges that the state appellate court relied on the *Williams/Flynn* principle to resolve Musladin's claim. Pet'r Br. 5.

As the state court noted, "[i]n order for defendant to prevail on his claim of being denied a fair trial he must show either actual or inherent prejudice." PA 74a (citing *Flynn*, 475 U.S. at 570). Citing an Eleventh Circuit case that applied *Williams* and *Flynn*, the state court correctly identified this Court's test for inherent prejudice. inherent prejudice is established when "'an unacceptable risk is presented of impermissible factors coming into play.'" *Id.* (quoting *Woods v. Dugger*, 923 F.2d 1454, 1457 (11th Cir. 1991)). Significantly, the state court then found the "wearing of photographs of victims in a courtroom *to be* an 'impermissible factor coming into play.'" PA 75a. (emphasis added) The state court thus determined that this Court's test for inherent prejudice had been satisfied. *See Flynn*, 575 U.S. at 570. This should have been the end of the state court's analysis.

The state court went on, however, to deny Musladin's claim because it did "not believe the buttons in this case branded defendant 'with an unmistakable mark of guilt' in the eyes of the jurors." PA 74a (quoting *Flynn*, 475 U.S. at 570-71). This was error. As the court of appeals noted:

> [T]he state court unreasonably applied federal law by imposing an additional and unduly burdensome requirement – demanding that the challenged practice cause the "brand[ing]" of the defendant with an "unmistakable mark of guilty" – even though the *Williams* test for finding "inherent prejudice" had already been met. The court specifically found "the wearing of photographs of victims in a courtroom to be an 'impermissible factor coming into play'" (emphasis added). Under *Williams* and *Flynn*, that finding, in itself establishes "inherent prejudice" and requires reversal.

Musladin, 427 F.3d at 658 (quoting state court decision at issue); *see also id.* X [*id.* at 659] ("This additional test imposes too high and too unreasonable a burden and is contrary to established Supreme Court law."). Discussing *Williams* and *Flynn*, the court of appeals correctly noted that this Court has never required that a challenged courtroom practice "brand" the defendant as guilty before he can establish inherent prejudice. *Id.* at 659. The court of appeals thus concluded that "[t]he state court's imposition of the additional 'branding' requirement was contrary to clearly established federal law and constituted an unreasonable application of that law." *Id.* at 659-60. The court of appeals had authority to – and properly did – grant habeas relief under § 2254(d)(1) because this ruling was correct.

The State disagrees with the court of appeals conclusion for several reasons. Pet'r Br. 32-34. In particular, it contends that the state court's decision was correct because it "precisely recited the correct standard at the outset of addressing [Musladin's] claim." Pet'r Br. 32. What the State fails to recognize, however, is that after citing this Court's *Williams/Flynn* rule, the state court relied upon a confusing and potentially improper formulation of that rule as set forth by the Eleventh Circuit in *Woods*. The state court mistakenly gleaned from *Woods* a test that actually differs from the test set forth by this Court in *Williams/Flynn*.

Specifically, the Eleventh Circuit in *Woods* stated that a court looking at a *Williams/Flynn* claim "must examine two factors: first, whether there is an impermissible factor coming into play, and second, whether it poses an unacceptable risk." 923 F.2d at 1457. This formulation is confusing because it seems to suggest that the word "risk"

relates to the issue of whether a particular courtroom practice is an impermissible factor. In fact, under the *Williams/Flynn* rule, "risk" relates to the issue of whether the impermissible factor did or could come into play. *Cf. Flynn*, 475 U.S. at 570 (explaining that the constitutional question is whether there is "an unacceptable risk . . . of impermissible factors coming into play") (internal quotation omitted). The state court fell prey to this confusion because it had already found that an impermissible factor had come into play, a finding which – standing alone – was sufficient to demonstrate a constitutional violation under *Williams/Flynn* but apparently believed it needed to go one step further due to the manner in which the test was articulated in *Woods*.

The state court then went on to conclude that the buttons at issue did not brand Musladin with an "unmistakable mark of guilt," a statement which could only be construed as: (1) an additional requirement not contained in – and, therefore, contrary to – the *Williams/Flynn* rule, or (2) a finding that the buttons were not an impermissible factor. The latter construction, however, would render the state court's decision internally inconsistent. Therefore, the only reasonable way to construe the state court's opinion is precisely the way the Ninth Circuit did below: the addition of an element to this Court's *Williams/Flynn* rule. *Musladin*, 427 F.3d at 658.

Finally, the State argues that because the "branding" standard is an alternate test for inherent prejudice, the state-court decision was not contrary to or an unreasonable application of the *Williams/Flynn* principle. Pet'r Br. 34-35. Its argument is premised on its position that "branding with an unmistakable mark of guilt" and "unacceptable risk of impermissible factors" are alternative standards for

establishing inherent prejudice. *Id.* The State's proposition misunderstands *Williams/Flynn*. While the question of whether a challenged courtroom practice brands a defendant "with an unmistakable mark of guilt" may be relevant to a determination of whether the practice is impermissible, nothing in *Williams/Flynn* states that a defendant fails to make out a constitutional violation absent such "branding." *See Flynn*, 475 U.S. at 56-57.

The state court properly found that an impermissible factor had come into play – a factual determination that, the State would seemingly agree, is entitled to great deference from all reviewing federal courts. *See* 28 U.S.C. § 2254(e)(1) (according presumption of correctness to state-court factual determinations). Under this Court's clearly settled law at the time of the state-court decision, that determination conclusively established that constitutional error occurred during Musladin's trial.

C. The Ninth Circuit Correctly Determined that the State Court's Application of Clearly Established Federal Law to the Facts of this Case Was Objectively Unreasonable

As explained in Section II (B), supra, the Ninth Circuit correctly concluded that the state court's decision was contrary to federal law that was clearly established by this Court in *Williams* and *Flynn*. This should end the inquiry, for the Ninth Circuit's discussion of *Norris* was not essential to its core holding and did not offend the limitations of AEDPA. Moreover, the court of appeals properly considered persuasive circuit authority in its "unreasonable application" analysis of the habeas claim. The result of that analysis was also correct: the state court was objectively

unreasonable in its application of this Court's clearly established law from *Williams* and *Flynn*.

1. The Court of Appeals Correctly Held that the State Court's Application of the *Williams/Flynn* Rule Was Objectively Unreasonable

With or without *Norris*, the conclusion of the court of appeals was correct: the state court's application of the *Williams/Flynn* rule was objectively unreasonable. The *Williams/Flynn* principle is designed to help protect a defendant's right to a fair trial, as guaranteed by the Fifth, Sixth and Fourteenth Amendments. *Williams*, 425 U.S. at 503; *Flynn*, 475 U.S. at 567. This Court has recognized that courtroom factors may deny a defendant a fair trial by undermining the presumption of innocence and by suggesting guilt through "'circumstances not adduced as proof at trial.'" *Flynn*, 475 U.S. at 567 (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)); *see also Williams*, 425 U.S. at 503-04 (noting fundamental, constitutional nature of presumption of innocence). In assessing whether a challenged courtroom factor impermissibly affects the defendant's right to a fair trial, "[c]ourts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." *Williams*, 425 U.S. at 504. This means that courts deciding whether a courtroom practice is inherently prejudicial must take into account the nature of the proceedings and issues before the jury. *See, e.g., Flynn*, 475 U.S. at 569 (noting that security officers in courtroom might suggest that defendant is dangerous or untrustworthy under certain circumstances); *Deck v. Missouri*, 544 U.S. 622, 632-33 (2005) (considering nature of issues

before jury in deciding whether routine shackling at penalty phase of capital trial is constitutionally acceptable).

The State argues that the state appellate court's alleged finding of no prejudice was supported by the trial court's conclusion that the buttons were not prejudicial. Pet'r Br. 29 ("The judge viewed the buttons, was present throughout the trial, and was in the best position to determine any potential prejudicial effect the buttons may have had."). The State's argument ignores the fact that the trial court ruled on the buttons' prejudicial effect at the very beginning of the case, before opening statements, when it presumably did not know that Musladin's claim of self-defense would be the central issue for the jury to decide. *See* PA 73a (defense counsel moved to exclude buttons [illegible] before opening statements); *see also* JA 5 (prosecutor starts opening statement). Although the state appellate court knew that self-defense was at issue, *see* PA 58a (Musladin "admitted shooting Tom, but claimed self-defense"), it did not consider the effect of the buttons on Musladin's claim of self-defense – or on any other facts specific to Musladin's trial. PA 73a-75a.

The Ninth Circuit held that the state court erred by failing to analyze the effect of the buttons in light of the particular circumstances of Musladin's case and the issues before the jury. *Musladin*, 427 F.3d at 660-61. It noted that the message from the buttons in this case was "even stronger and more prejudicial than the one conveyed in *Norris*." *Id.* at 660.

> In this case, the buttons actually depicted the individual that the defendant was charged with murdering and represented him as the innocent party, or the victim. Here, the direct link between

> the buttons, the spectators wearing the buttons, the defendant and the crime that the defendant allegedly committed was clear and unmistakable. The primary issue at Musladin's trial was whether it was the defendant or the deceased individual who was the aggressor. The buttons essentially "argue" that Studer was the innocent party and that the defendant was necessarily guilty; that the defendant, not Studer, was the initiator of the attack, and, thus, the perpetrator of a criminal act.

Id. The court below, unlike the state courts, properly "look[ed] beyond the general sentiment a button reflects and . . . determine[d] the specific message that the button convey[ed] in light of the particular facts and issues before the jury." *Id.* at 661. This approach mirrors that of this Court, which has routinely examined the specific message of external factors present at trial. *See, e.g., Flynn*, 475 U.S. at 569 (discussing message sent by security officers); *Deck*, 125 S. Ct. at 2014 (discussing message sent by shackling).

Despite these facts, the State argues that the state court was not objectively unreasonable because "there does not appear to be any decision reversing a judgment on the basis of spectators wearing buttons bearing photographs of a victim." *See* Pet'r Br. 29. There are a host of reasons why these cases do not mean what the State claims they mean. What the State misses is the fact that virtually all of these cases condemn the practice of having buttons, or similar

communicative garb such as T-shirts, worn by trial spectators in a jury trial.[4]

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[4] Most lower courts addressing this issue agree that spectators wearing buttons, shirts, or ribbons in support of either the victim or defendant should not be permitted in the courtroom, or if allowed in the courtroom, any obvious displaying of the buttons to the jury should not be allowed. **Federal Appellate Courts:** *see Norris*, 918 F.2d at 831 ("Just as the compelled wearing of prison garb during trial can create an impermissible influence on the jury throughout trial, the buttons' message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence."). **State Supreme Courts:** *see Wright v. State*, 577 S.E.2d 782, 784, 276 Ga. 419, 420 (2003) ("The trial court forbade those wearing the T-shirts [bearing the victim's likeness] from entering the courtroom, and the record does not show that any juror was ever exposed to a relative of [the deceased] who was wearing one."); *Johnson v. Commonwealth*, 529 S.E.2d 769, 781-782, 259 Va. 654, 676 (2000) ("When Johnson raised his objection to the buttons at the beginning of trial, the court ruled that the spectators would not be permitted to display the buttons in any manner that would allow the jurors to see them. The court also ruled that anyone wearing a button was required to refrain from any contact with any of the jurors."); *State v. Speed*, 961 P.2d 13, 30, 265 Kan. 26, 48 (Kan. 1998) ("[I]t would seem that the wearing of such buttons or t-shirts is not a good idea because of the possibility of prejudice which might result. Under the circumstances, it would have been better for the district court to have ordered the buttons removed or the t-shirts covered up."); *State v. Rose*, 548 A.2d 1058, 1104, 112 N.J. 454, 541-542 (N.J. 1988) ("In appropriate circumstances, [the power to assure fair proceedings and an impartial jury] might properly be exercised by imposing limitations on the dress of police or correction officers, by prohibiting the display of buttons or emblems, or by other proscriptions necessary to preserve decorum and an atmosphere of impartiality. . . ."); *State v. Franklin*, 327 S.E.2d 449, 455, 174 W. Va. 469, 475 (1985).

Indeed, the court's cardinal failure in this case was to take no action whatever against a predominant group of ordinary citizens who were tooth and nail opposed to any finding that the defendant was not guilty. This Court quite simply cannot state that the mere presence of the spectators wearing MADD buttons and the pressure and activities of the uniformed sheriff leading them did not do irreparable damage to

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Courts have admittedly ruled in many of these cases that such buttons or T-shirts did not compromise a defendant's right to a fair trial because the jury did not see the buttons or because the effect of the buttons was de minimis, but there is an almost universal consensus condemning communicative clothing being worn in the courtroom. In light of this overwhelming authority, it cannot be said that courts legitimately differ on whether buttons should be allowed in a courtroom. Indeed, even in this Court, where a display of victim support would seem to be an unlikely threat to fair and reasoned decision making, visitors are nonetheless admonished to refrain from

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the defendant's right to a fair trial by an impartial jury. Indeed, it constitutes reversible error.

> **State Appellate Courts:** *see State v. Lord*, 114 P.3d 1241, 1243, 128 Wash. App. 216, 219 (Wash. Div. 2005) *review granted in part by* 134 P.3d 233 (Wash. May 4, 2006) ("We agree that the better practice would have been for the trial court to have prohibited the buttons when Lord first requested, rather than on the fourth day of trial."); *People v. Houston*, 29 Cal. Rptr. 3d 818, 851-852 (Ct. App. 2005) ("The better practice of any trial court is to order such buttons and placards [bearing the victim's likeness] removed from display in the courtroom promptly upon becoming aware of them in order to avoid further disruption."). **State Trial Courts:** *see People v. Pennisi*, 563 N.Y.S.2d 612, 616 (N.Y. Sup. Ct. 1990) ("[T]he wearing of noticeable or obtrusive, expressive or symbolic clothing, uniforms, and/or accessories, including . . . buttons . . . , whether utilized as illustrations of concern, etc., for or against persons, issues, or causes can constitute conduct disruptive of a courtroom environment . . . dedicated to the appearance as well as the reality of fairness and equal treatment." The *Pennisi* Court also cited a New York County Supreme Court Justice's banning from the courtroom of a t-shirt worn by the defendant's brother, which bore the words, "My Brother Antron McCray Is Innocent." *Id.* at 616, 149 Misc. 2d at 41 (citation omitted).).

taking, *inter alia*, "**display buttons**" into the courtroom when Court is in session.[5] The Ninth Circuit decision that the state appellate court acted unreasonably by refusing to reverse Musladin's conviction is eminently reasonable and legally sound.

Moreover, it was objectively unreasonable for the state appellate court to apply the *Williams/Flynn* principle to the facts of this case without considering Musladin's claim of self-defense – the key issue before the jury. Without considering the context of this defense, the state court could not have reasonably decided whether the buttons raised an "unacceptable risk of impermissible factors." Because the state-court decision was an objectively unreasonable application of *Williams* and *Flynn*, the Ninth Circuit had authority under § 2254(d)(1) to grant the writ.

III. This Court Need Not Undertake a Harmless Error Analysis

A. The State Waived Any Harmless Error Defense, or Alternatively, the Case Should Be Remanded to the Ninth Circuit for Harmless-Error Analysis

After the state court's decision was delivered in the present case, this Court appears to have clarified that harmless-error analysis should apply to the review of *Williams/Flynn* constitutional violations. *See Deck*, 544 U.S. at 635. However, because the State waived its harmless error defense, this Court need not undertake a harmless-error review. Alternatively, this Court should remand

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[5] See *Visitor's Guide to Oral Argument in the United States Supreme Court.*

this case to the Ninth Circuit for evaluation of this defense in the first instance.

1. The State Waived Its Claim that the Constitutional Error in this Case Was Harmless

It is widely recognized that "[l]ike other defenses to habeas corpus relief, the 'harmless error' obstacle does not arise unless the state asserts it; the state's failure to do so in a timely and unequivocal fashion waives the defense." Randy Hertz and James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 31.2(a) (5th ed. 2005); *see also Trest v. Cain*, 522 U.S. 87, 89 (1997) (explaining that state may waive procedural-default defense by not raising it).

Because the State failed to assert a defense of harmless error before both the Ninth Circuit and the district court, this Court should deem the issue waived in its entirety and should grant the writ of habeas corpus.

First, while the State did contest Musladin's constitutional claim on federal habeas appeal – that the spectator's wearing of buttons was inherently prejudicial and violated his right to a fair trial – it did not argue alternatively that any such constitutional error nevertheless was harmless. *See* Appellee's Br. at 26-34. The State's decision not to assert harmlessness stands in marked contrast to the position it took with respect to at least two of Musladin's other claims on appeal.[6] *Cf. id.* at 21-22 (asserting harmlessness defense

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[6] Nor does the State's mere recitation of the harmless error standard in its appellate brief competently assert the defense. *See, e.g.*, *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("We see no reason to abandon the settled appellate rule that issues adverted to in a

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to Musladin's Sixth Amendment right-to-counsel claim); *id.* at 40-41 (asserting harmlessness defense to Musladin's claim that fair trial was denied when he was prevented from putting in evidence relevant to self-defense).

In view of the State's consistent failure to raise the defense of harmless error, this Court should deem the issue waived and should decline to address it here. This Court generally will not address issues that were not raised, briefed or resolved in the lower federal courts. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001); *Glover v. United States*, 531 U.S. 198, 205 (2001); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *Schiro v. Farley*, 510 U.S. 222, 228 (1994).

2. If this Court Determines that No Waiver Occurred Then Remand Is Appropriate

Assuming that this Court does not find that the State waived the harmless error defense, and accepting that a *Williams/Flynn* violation requires harmless-error review, the appropriate course would be a remand. A remand for a full harmless-error analysis is appropriate because that analysis was not conducted by the Ninth Circuit below. Indeed, this Court adopted precisely such a rule in *Calderon v. Coleman*, 525 U.S. 141, 146-47 (1998).

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perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."); *Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) (following *Zannino*'s "settled appellate rule" regarding waiver).

3. Should this Court Nevertheless Undertake a Harmless-Error Analysis, A Writ of Habeas Corpus Must Issue

Any review for harmless-error should lead to the conclusion that the Ninth Circuit's decision should be affirmed. Where a federal habeas court must determine whether constitutional trial error was harmless, the question is "whether the error had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also O'Neal v. McAntrich*, 513 U.S. 430, 435-36 (1995) (reviewing these cases).

Further, the "risk of doubt" over the harmlessness of a constitutional trial error falls on the State.[7] *O'Neal*, 513 U.S. at 439; *see also id.* at 438-39 (rejecting language from *Brecht* suggesting that a habeas petitioner is not entitled to relief based on trial error "unless they can establish that it resulted in '*actual prejudice.*'") (emphasis in original). This "doubt-as-to-harmlessness question" was fully explained in *Kotteakos* – the genesis of the current

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[7] As *O'Neal* recognized, "the original common-law harmless-error rule put the burden on the beneficiary of the error [here, the State] . . . to prove that there was no injury." *Id.* (*quoting Chapman v. California*, 368 U.S. 24 (1967)). *O'Neal* further noted that the same rule was applied in *Kotteakos*. *Id.* While *O'Neal* eschews phrasing the harmless-error analysis in terms of burdens of proof, *see id.* at 995, the common-law "burden" rule nonetheless informs the analysis. *Cf. United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004) ("When the Government *has the burden of showing that constitutional trial error is harmless* because it comes up on collateral review, the heightened interest in finality generally calls for the Government to meet the more lenient *Kotteakos* standard.") (emphasis added).

Brecht/*O'Neal* harmless error standard. There, the Court stated:

> If, when all is said and done, the [court's] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

O'Neal, 513 U.S. at 437-38 (quoting *Kotteakos*, 328 U.S. at 764-65)). Indeed, as *O'Neal* held, "if the harmlessness of the error is in grave doubt," the court must grant the habeas petitioner relief. *Id.* at 440.

Under the framework set forth by *O'Neal* and *Kotteakos*, the facts of the present case compel a conclusion that the constitutional error at Musladin's trial (1) "had a substantial and injurious . . . influence on the jury's decision, or at a minimum that (2) "grave doubt" remains as to the harmlessness of that constitutional error. *Id.* at 440-42.

The court of appeals' opinion below sets forth compelling reasons to conclude that the constitutional error in this case had a substantial effect on the jury's decision. As the court of appeals explained, the Studer family sat in the front row of the gallery, "directly behind the prosecution

and in clear view of the jury," and wore buttons on their shirt with a photo of the deceased, Tom Studer. PA X; *Musladin*, 427 F.3d at 655. The buttons were several inches in diameter and "very noticeable." *Id.* That the jury saw the buttons is an entirely reasonable inference. Moreover, Musladin's defense at trial was one of self-defense. *See id.* at 654-55. Accordingly, a critical component of the jury's decision on guilt was its assessment of whether or not Tom Studer was, on one hand, really a "victim," or, on the other, really the aggressor. *Id.* As the Court of Appeals explained,

> In this case, the buttons actually depicted [Tom Studer] and represented him as the innocent party, or the victim. Here, the direct link between the buttons, the spectators wearing the buttons, the defendant, and the crime that the defendant allegedly committed was clear and unmistakable. . . . The buttons essentially "argue" that Studer was the innocent party and that the defendant was necessarily guilty; that the defendant, not Studer was the initiator of the attack, and, thus, the perpetrator of the criminal act.

Id. at 660.

Given the spectators' close proximity to the prosecutor, and the fact that the buttons they wore were in clear view of the jury, it is entirely reasonable to conclude that the buttons' message – a message in direct contrast to Musladin's defense – had a substantial influence on the jury.

Habeas "relief must be granted" in the present case because, at a minimum, "grave doubt" remains over whether the constitutional violation at Musladin's trial

constituted harmless error. *O'Neal*, 513 U.S. at 440. In addition to the compelling reasoning of the Ninth Circuit as set forth above, *id.* at 437, the existence of grave doubt here also is supported by this Court's prior decisions discussing the uncertainty intrinsic to a quantitative analysis of constitutional error that impacts a jury. As this Court explained in *Riggins v. Nevada*:

> We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril. Like the consequences of compelling a defendant to wear prison clothing, see *Estelle v. Williams*, or of binding and gagging an accused during trial, see Allen, the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript. What the testimony of doctors who examined Riggins establishes, and what we will not ignore, is a strong possibility that Riggins' defense was impaired. . . .

504 U.S. 127, 137 (1992) (emphasis added, internal citations omitted).

Deck echoed this same logic. Rejecting Missouri's argument that "the defendant suffered no prejudice" from being shackled during the sentencing phase of his trial, this Court stated that the

> argument fails to take account of this Court's statement in *Holbrook* that shackling is inherently prejudicial. That statement is rooted in our belief that the practice will often have negative effects, but – like the consequences of compelling a defendant to wear prison clothing or of forcing

> him to stand trial while medicated – those effects cannot be shown from a trial transcript.

Deck, 544 U.S. at 635.

The common thread running through *Deck*, *Riggins*, and *Flynn* is that certain errors are presumptively prejudicial not only by their very nature, but also because their effects on a jury are not quantifiable by reference to a trial record. Criminal defendants, therefore, "need not demonstrate actual prejudice to make out a due process violation" based on such error. *Id.* at 635. Just as the presumptive prejudice establishes a due process violation in the first instance, it follows that the presumptive prejudice also raises substantial doubt as to how that violation affected the jury.

CONCLUSION

For the reasons provided above, this Court should uphold the decision of the Ninth Circuit Court of Appeals. Alternatively, the Court should remand this case to the Ninth Circuit for a determination in the first instance of whether the *Williams/Flynn* error was harmless.

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Respectfully submitted,

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In The
Supreme Court of the United States

THOMAS L. CAREY, Warden,

Petitioner,

v.

MATHEW G. MUSLADIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

A. The Ninth Circuit Erroneously Relied On Circuit Law To Define "Clearly Established Federal Law" For Purposes of 28 U.S.C. § 2254(d)(1)

Respondent acknowledges that circuit law has no role in shaping clearly established law under AEDPA. Resp. Br. 16-20. He denies that the Ninth Circuit so used *Norris* v. *Risley*, 918 F.2d 828 (9th Cir. 1990), however, and maintains that circuit law may define or determine the "meaning" of this Court's clearly established federal law so long as it is not a "source" of that law. See Pet. Br. 16-17, 18 (stating decisions of this Court are only "source" of clearly established law), 20-21 (stating circuit court may look to circuit law to "assess meaning" of general rules). He is incorrect on both counts.

The Ninth Circuit expressly invoked *Norris both* to "determine" and to define the clearly established federal law's "meaning." Pet. App. 7a-9a, 13a-14a. It plainly and specifically overturned the state court of appeal decision because it was contrary to *Norris*. Pet. App. 6a, 9a, 13a-15a.

True, as respondent observes, before mentioning *Norris* v. *Risley*, 918 F.2d 828, the Ninth Circuit described as "clearly established" law the most closely applicable rule from this Court's decisions "that certain practices attendant to the conduct of a trial can create such an 'unacceptable risk of impermissible factors coming into play,' as to be 'inherently prejudicial' to a criminal defendant." Pet. App. 6a (citing *Holbrook* v. *Flynn*, 475 U.S. 560, 570 (1986) and *Estelle* v. *Williams*, 425 U.S. 501, 505 (1976)); see Resp. Br. 20. But it is not true that "by the time the Ninth Circuit turned to *Norris* in its 'clearly

established' analysis, the questions of whether the law was clearly established and the resolution of what that law was, were fait accomplis." Resp. Br. 19-20.

The Ninth Circuit's identification of "clearly established federal law" hardly began and ended with *Flynn* and *Williams*. Under the heading "Clearly Established Federal Law," the lower court stated that *Norris* had "persuasive value in an assessment of the meaning of the federal law that was clearly-established by *Williams* and *Flynn*." Pet. App. 6a. The federal court then characterized its "decision" respecting *Norris* was "to afford it persuasive weight when determining the federal law as established by *Williams*." Pet. App. 9a. The Ninth Circuit proceeded to fault the state court of appeal for an "unreasonable" application of *Norris*, stating that the state court "attempted to distinguish *Norris*, but *Norris* simply cannot be reasonably distinguished." Pet. App. 8a-9a, 13a-14a, 75a. This was error. The *only* clearly established federal law against which the state decision could be evaluated for reasonableness, if any, was *Flynn* and *Williams*, *not* "the *Williams* test, as it was explained in *Norris*."[1] Pet. App. 9a; see 28 U.S.C. § 2254(d)(1). That the Ninth Circuit identified *Flynn* and *Williams* as setting forth the clearly established law before invoking *Norris* is beside the point, both in the historical sense that *Norris* is the decision the Ninth

[1] Strictly speaking, what the Ninth Circuit refers to as the "*Williams* test" concerning "impermissible factors coming into play" was first set forth as a "test," or one of the relevant "questions" to be answered, in *Flynn*, 475 U.S. at 570. See Pet. App. 9a, 10a. The "impermissible factor" language in *Williams* was used in passing to describe the effect of a defendant's prison clothing, before the Court reached its conclusion that such clothing is inherently prejudicial. *Williams*, 425 U.S. at 505.

Circuit actually applied to grant respondent habeas relief and in the analytical sense that *Norris* should have had no place *at all* in the Ninth Circuit's view of "clearly established federal law."[2]

Respondent suggests that the meaning of general rules like the one in *Flynn* and *Williams* "must emerge in application over the course of time," Resp. Br. 16 (quoting *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004)), and that 28 U.S.C. § 2254(d)(1) permits habeas relief based on "the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced," Resp. Br. 16 (quoting *Lockyer* v. *Andrade*, 538 U.S. 63, 76 (2003)). This, respondent reasons, means the Ninth Circuit "properly considered the persuasive reasoning of *Norris* . . . in assessing the meaning of this general rule that has emerged in application over time." Resp. Br. 16-17. But *Alvarado* did not suggest that the meaning of "clearly established federal law" may "emerge" from circuit or state courts. See *Alvarado*, 541 U.S. at 663-64; see also *Kane* v. *Espitia*, 126 S. Ct. 407, 406, 163 L. Ed. 2d 10, 13 (2005) (recognizing circuit split on whether *Faretta* v. *California*, 422 U.S. 806 (1975) implied certain rights irrelevant since *Faretta*'s silence on issue barred habeas relief). The passage respondent quotes from *Alvarado* concerned the *reasonableness of application* of

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[2] In his Introduction, respondent suggests the basis for petitioner's claim that the Ninth Circuit relied on *Norris* is a single footnote in the Ninth Circuit's opinion. Resp. Br. 10; see Pet. App. 11a n.1. Petitioner in fact has never cited the footnote. Suffice it to say the Ninth Circuit decision mentions *Norris* by name or implicitly on almost every page. See Pet. App. 2a-15a. Far from a red-herring, Resp. Br. 10, it forms the nucleus of what effectively amounts to the Ninth Circuit's de novo review of the state-court decision.

this Court's law, not what law was clearly established for purposes of that case. *Id.*; see 28 U.S.C. § 2254(d)(1). The point of that passage is that states are entitled to more leeway to apply general rules, not that federal habeas courts are entitled to leeway in defining such rules. See *Alvarado*, 541 U.S. at 664.

Nor can mere euphemisms about the Ninth Circuit's misuse of *Norris* obscure the basic fallacy in respondent's argument. To condemn circuit law used to define or to serve as a source of clearly established federal law on one hand, yet to praise circuit law used to "assess the meaning" of clearly established federal law on the other, is to argue a distinction without a difference. The argument exists only to elide this: if a federal habeas court must look to federal circuit law or to state law for the "meaning" of a decision by this Court, then perforce that *meaning* is not "clearly established." Pet. Br. 17. Put differently, federal habeas relief that rests on the meaning of a general rule by this Court having "emerged" in a decision of another court improperly substitutes the latter court's law in lieu of this Court's clearly established law.

AEDPA affords federal courts no leeway to shape a clearly established rule of this Court under the guise that a general rule's true meaning can now "emerge" by granting relief in the habeas case *sub judice*. AEDPA requires quite the opposite. Federal habeas courts must give state courts *broader* discretion in applying this Court's general rules. *Yarborough* v. *Alvarado*, 541 U.S. at 664.

Respondent suggests that circuit law is useful "in confirming that this Court's decisions have in fact clearly created a rule of law." Resp. Br. 18. Actually, that practice is merely innocuous because it is unnecessary. See, *e.g.*,

Garcia v. *Carey*, 395 F.3d 1099, 1104 (9th Cir. 2005) (stating that *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979) standard for sufficiency of the evidence is "clearly established" for purposes of AEDPA). For example, a citation to a circuit decision holding *Holbrook* v. *Flynn*, 475 U.S. 560, and *Estelle* v. *Williams*, 427 U.S. 501, "clearly established" that some courtroom practices may be "so inherently prejudicial that [the defendant] was thereby denied his constitutional right to a fair trial" would add nothing not apparent from this Court's decisions.[3] *Flynn*, 475 U.S. at 570; see *Williams*, 427 U.S. at 501; Pet. App. 6a. At any rate, the Ninth Circuit did not cite *Norris*, a pre-AEDPA decision, as authority that *Flynn/Williams* is clearly established federal law. See Pet. App. 6a-9a.

Respondent also argues a kind of necessity exception to AEDPA, applicable here since the Ninth Circuit never said it "was necessary to use *Norris* to define what was clearly established law." Resp. Br. 22. He asserts: "Whenever a court takes a general of law and applies it to a given set of facts, its decision will give further 'definition' to the general rule, at least in some factual context. This is not

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[3] Respondent asserts petitioner waived its argument that, while the *Flynn/Williams* rule is clearly established, "it is not at all clearly established that the rule controls the instant circumstances." Resp. Br. 10-11; see Pet. Br. 15; Pet. App. 22a (Kleinfeld, J., dissenting from order denying rehearing en banc). Even assuming the dubious proposition that a party can waive the applicable law governing a claim, it is impossible to find waiver from the State's contention that *Flynn* and *Williams* do not require the granting of habeas relief in this case. Petitioner's chief point, in any event, was that the lack of clarity over whether *Flynn/Williams* governs the instant factual context of spectator behavior dictates heightened deference towards the state decision. Pet. Br. 15-16.

improper because such an undertaking does not change the general rule." Resp. Br. 22.

But whether the federal habeas court purportedly is "defining," "determining," Pet. App. 9a, or "assessing the meaning of," Pet. App. 7a, established federal law, circuit law cannot function as clearly established federal law, even in conjunction with a general rule such as in *Flynn* and *Williams*. Circuit applications of a general rule cannot "give further 'definition' to the general rule," Resp. Br. 22, where the only source of "clearly established federal law" is the holdings of this Court, 28 U.S.C. § 2254(d)(1). Respondent's argument, like the Ninth Circuit's decision below, attempts to make a general rule specific to a different context *without this Court first having demanded that specificity of state courts themselves*, thereby shrinking, rather than increasing, the leeway given to state courts in applying general rules. Such is not the law. See *Yarborough* v. *Alvarado*, 541 U.S. at 664.

B. The State Court's Application Of *Flynn* And *Williams* Was Objectively Reasonable

Respondent contends that "[w]ith or without *Norris*, the conclusion of the court of appeals was correct," because the state court of appeal unreasonably applied *Holbrook* v. *Flynn*, 475 U.S. 560 and *Estelle* v. *Williams*, 425 U.S. 501, Resp. Br. 28. He asserts that the state court of appeal "did not consider the effect of the buttons on Musladin's claim of self-defense—or on any other facts specific to Musladin's trial." Resp. Br. 29; see Resp. Br. 30. He reasons that because the state court did not find a prejudicial message in the three buttons, and did not expressly discuss "the effect of the buttons on Musladin's claim of self-defense," it

must not have considered the "nature of the proceedings and issues before the jury." Resp. Br. 28-29.

Preliminarily, respondent's effort to portray his defense case as constituting the relevant facts on this issue is unavailing. See Resp. Br. 1-4; cf. Pet. App. 55a-60a (state court of appeal), 32a-33a (district court). The state court of appeal necessarily viewed the evidence in the light most favorable to the State and presumed in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. See *People* v. *Vann*, 12 Cal. 3d 220, 225, 115 Cal. Rptr. 352, 355-56, 524 P.2d 824, 827-28 (1974). Respondent also describes evidence not admitted at trial, impliedly suggesting that it bolstered his defense. See Resp. Br. 4. Suffice to say, the state courts and district court concluded the evidence was properly excluded. See also Pet. App. 18a ("The petitioner also asserts a number of other claims that he argues merit habeas relief. I would reject those claims as well, and would thus affirm the district court." (Thompson, J., dissenting)). No less unavailing is petitioner's oblique insertion of the "fact," never before proffered to any court, that the photograph on the buttons "depicted [Tom Studer] in a manner inconsistent with the reality of his appearance on the day in question." Resp. Br. 9. No evidence shows how the buttons depicted the victim, to say nothing of a purported inconsistency of the depiction with "reality." J.A. 8. The Ninth Circuit, without having the buttons before it, gave a similar baseless description of them as "representing" Mr. Studer "as the innocent party, or victim," Pet. App. 13a. These inventions cannot erase the fact that the state trial court found no prejudice ensued to petitioner after it had viewed the buttons in the trial courtroom. J.A. 4.

At any rate, it is not the clearly established law of this Court that the facts and issues to be determined at a particular trial—as distinct from the facts surrounding the challenged courtroom practice—must be considered in determining whether *inherent* prejudice lies. Although the Court suggested such factors were relevant in *Estelle* v. *Williams*, 425 U.S. at 506-08, and arguably in *Holbrook* v. *Flynn*, 475 U.S. at 569, respondent's asserted requirement appears to stem from the Ninth Circuit's holding below, not the previous holdings of this Court. Resp. Br. 33; see Pet. App. 14a. The fact that certain circumstances were considered in a case that clearly established a principle does not necessarily make that circumstance part of the "clearly established" formulation. Cf. *Kane* v. *Espitia*, 126 S. Ct. at 406 (recognizing that *Faretta* v. *California*, 422 U.S. 806 "clearly established" a right to self-representation, but had said nothing about any attending legal aid for self-represented defendants).

Here, the state trial and court of appeal, and district court, were all aware of respondent's self-defense claim at trial when they concluded the buttons were not inherently prejudicial.[4] See Pet. App. 32a-35a, 47a-50a, 58a-60a,

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[4] Respondent discounts the state trial judge's finding that the buttons were not prejudicial by noting such finding was made *before* trial, when it "presumably" was unaware of respondent's self-defense claim. Resp. Br. 29. To the contrary, respondent's trial counsel's brief had previously informed the trial judge, "The defense in this case is that the killing was done in self defense." CT 349 & 365; see CT 335, 390; see also CT 357 (identity not contested). Further, California trial judges are obliged at all times to take steps to promote an effective ascertainment of the truth regarding the matters involved. Cal. Penal Code § 1044; *People* v. *Cox*, 53 Cal. 3d 618, 700, 809 P.2d 351, 401, 280 Cal. Rptr. 692, 742 (1991). Had the trial judge at any point concluded the buttons were prejudicial in light of the evidence or issues being presented, it presumably would have acted accordingly.

74a-75a; J.A. 4. That the state court did not expressly discuss the effect of the buttons in light of respondent's self-defense claim does not demonstrate such circumstances were disregarded. Rather, they were implicitly considered absent some affirmative indication to the contrary. See generally *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (noting state court decisions to be given benefit of doubt under AEDPA). As for the message sent by the buttons, it is apparent the state court of appeal found that the buttons conveyed no clear message at all—regardless of the nature of the proceedings. See Pet. App. 74a-75a. As reflected in *Flynn*, a consideration of the nature of the proceedings and issues before the jury does not necessarily yield a conclusion that the challenged courtroom practice sent a prejudicial message. See *Holbrook* v. *Flynn*, 475 U.S. at 568-71. Such was the case here.

Respondent does not dispute that with the exception of the present case, "there does not appear to be any decision reversing a judgment on the basis of spectators wearing buttons bearing photographs of a victim." Pet. Br. 29; see Resp. Br. 30-32. As to the numerous cases rejecting a finding of inherent prejudice in this context, respondent broadly asserts, "There are a host of reasons why these cases do not mean what the State claims they mean." Resp. Br. 30; see Pet. Br. 29-30. He offers no support or explanation, just an argument that the state "misses the fact that virtually all of these cases condemn the practice of having buttons, or similar communicative garb such as T-shirts, worn by trial spectators in a jury trial."[5] Resp. Br.

[5] To the extent respondent suggests a *rule* or prohibition exists against the wearing of buttons by trial spectators, he is incorrect. See Resp. Br. 30 & 32 (stating courts "condemn" practice). As the citations

(Continued on following page)

30-31. A disfavored practice, however, is not necessarily an inherently prejudicial one, let alone one that warrants habeas relief under 28 U.S.C. § 2254(d)(1). Cf. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642-43 (1974) ("'Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.'" (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973))). Indeed, the state court of appeal here acknowledged that the wearing of buttons "should be discouraged." Pet. App. 75a; see also Pet. App. 49a-50a ((district court) "allowing the buttons was arguably not a prudent decision").

The point is not to suggest a rule permitting the wearing of buttons or other garb in all circumstances, but to show the reasonableness of the state court of appeal's decision that the buttons worn in this case were not inherently prejudicial. That decision comports with every published decision to have considered the specific question of photo buttons, factual or procedural variations in the cases notwithstanding. See Pet. Br. 29-30. As Amici points out, that fact alone should demonstrate the state court's decision was reasonable. Br. of *Amicus Curiae* of the Crim. Justice Legal Found. 8-13. The Ninth Circuit inexplicably disregarded the several photo button cases supporting the state court of appeal's decision and instead granted habeas relief based upon a single pre-AEDPA circuit case, which

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in respondent's brief reflect, it is more accurate to say it evokes supervisory oversight. See Resp. Br. 31-32 n.4.

did not involve a photo, but the slogan, "Women Against Rape."

C. The Ninth Circuit's Conclusion That The State Court's Analysis Was Contrary To This Court's Clearly Established Holdings Was Erroneous

Respondent claims the Ninth Circuit correctly found the state appellate court's description of the test for inherent prejudice was "contrary to" and unreasonably applied *Holbrook* v. *Flynn*, 475 U.S. 560, and *Estelle* v. *Williams*, 425 U.S. 501. Resp. Br. 23; see 28 U.S.C. § 2254(d)(1); Pet. App. 75a. His formalistic reading of a single sentence from the state court's opinion, Pet. App. 75a, cannot withstand this Court's pronouncements that the "fair import," or substance of the state court's analysis, rather than its grammatical precision, governs the propriety of habeas relief under 28 U.S.C. § 2254(d)(1). See *Woodford* v. *Visciotti*, 537 U.S. at 24; *Early* v. *Packer*, 537 U.S. 3, 9 (2002) (per curiam); Pet. Br. 31-32. As Amici points out, Congress surely did not intend to permit AEDPA limitations on habeas relief to be evaded by such games of "gotcha." Br. of *Amicus Curiae* of the Crim. Justice Legal Found. 15. The state court here arguably misspoke, but in substance reasonably applied this Court's precedent.

Despite respondent's precisionist reading of the last sentence of the state court's decision, the "fair import" of the opinion as a whole flatly precludes the meaning he and the Ninth Circuit ascribe to it. See *Woodford* v. *Visciotti*, 537 U.S. at 24; *Early* v. *Packer*, 537 U.S. at 9; Pet. Br. 32-33. The state court of appeal accurately stated the test for inherent prejudice; rejected respondent's reliance on *Norris* v. *Risley*, 918 F.2d 828; "discouraged" the wearing of

buttons generally; and found the buttons did not "brand" respondent with an "unmistakable mark of guilt"—language this Court itself used to conclude that inherent prejudice had not been shown in *Holbrook* v. *Flynn*, 475 U.S. at 570-71. See Pet. Br. 32-33; Pet. App. 74a-75a (quoting *Flynn*, 475 U.S. at 570-71). Even assuming the state court intended to describe the "wearing of photographs of victims in a courtroom" generally to be an "impermissible factor," and therefore inherently prejudicial, the state court immediately distinguished "the buttons in *this* case" as an exception to that categorization. Pet. App. 75a (emphasis added); see Pet. Br. 32-33. In short, the state court's opinion reflects a finding that these buttons were *not* inherently prejudicial.

Attempting to bolster his interpretation of the state court of appeal's language, respondent suggests that the state court "fell prey" to confusion created by *Woods* v. *Dugger*, 923 F.2d 1454 (11th Cir. 1991). Resp. Br. 25-26. If anything, *Woods* demonstrates that a court's arguably inarticulate recitation of a test need not nullify that court's reasoning or application of the test. *Woods* involved a defendant whose trial for the murder of a correctional officer was attended by numerous uniformed correctional officers, not present for reasons of security. *Woods*, 923 F.2d at 1457-59. The court in *Woods* correctly stated the test for inherent prejudice is "whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Holbrook* v. *Flynn*, 475 U.S. at 570 (quoting *Estelle* v. *Williams*, 425 U.S. at 505). The court said: "This test requires us to examine two factors: first, whether there is an 'impermissible factor coming into play' and second, whether it poses an 'unacceptable risk.'" *Woods* v. *Dugger*, 923 F.2d at 1457. The state court of appeals here quoted

Woods's description of the *Flynn/Williams* test. Pet. App. 74a.

Woods's description of the *Flynn/Williams* test is arguably imprecise, insofar as the relevant "risk" at issue in the "impermissible factors" test is that an impermissible factor *will* come into play. Cf. *Holbrook* v. *Flynn*, 475 U.S. at 571 ("we simply cannot find an *unacceptable risk of prejudice* in the spectacle" (emphasis added)). *Woods*'s seeming reconfiguring of the elements of the *Flynn/Williams* test does not, however, reflect a decision materially different than, let alone "contrary to," this Court's precedent.[6] *Woods* bears this out when, after purportedly misdescribing the test, it concluded "there was 'an unacceptable risk [of] impermissible factors coming into play.'" *Woods* v. *Dugger*, 923 F.2d at 1459 (quoting *Holbrook* v. *Flynn*, 475 U.S. at 570, brackets in *Woods*). While a state court's description of an applicable test may be relevant to the inquiry whether the resulting analysis withstands § 2254(d)(1), it is the "fair import" of the state court's analysis that is determinative. See *Early* v. *Packer*, 537 U.S. at 9.

Respondent argues the Ninth Circuit correctly found the state court imposed "an additional and unduly burdensome requirement" on him when it found the buttons did not "brand" him "with an unmistakable mark of guilt." Pet. App. 10a, 75a; Resp. Br. 26-27. His position rests,

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[6] Indeed, before the California Supreme Court and district court, respondent himself urged the *Woods* test he challenges now. Pet. App. 47a; Memo. of Points and Auth. in Supp. of Pet. for Writ of Habeas Corpus 37 (filed June 5, 2000), Answer to Order to Show Cause Exh. I at 33 (filed May 14, 2001), in *Musladin* v. *Lamarque*, U.S.D.C., N.D. Cal. No. C 00-1998 JL (PR).

however, on the faulty premise that the state court had already found inherent prejudice, and should have ended its inquiry. See Resp. Br. 26-27. That premise is flawed as petitioner has shown. Pet. Br. 33-35.

Respondent asserts that the state court of appeal's finding that buttons are an "impermissible factor," coupled with its finding that the buttons here did not "brand" him "with an unmistakable mark of guilt," means either (1) the "branding" language was an additional requirement distinct from the *Flynn/Williams* test, or (2) "the buttons were not an impermissible factor." Resp. Br. 26. Respondent reasons that the first interpretation is reasonable, because the second "would render the state court's decision internally inconsistent." Resp. Br. 26. See *Woodford* v. *Visciotti*, 537 U.S. at 24. Not surprisingly, he urges this Court to glean constitutional error over mere grammatical inconsistency. But AEDPA gives the state court, not the habeas petitioner, the benefit of the doubt in interpreting state decisions. In any event, respondent's argument rests on the flawed premise that the state court's describing the wearing of buttons as an "impermissible factor" means it found the buttons here were inherently prejudicial. "[T]he state court's 'impermissible factor' comment is most reasonably understood as reflecting that court's view that buttons bearing a victim's photograph should not be worn in a courtroom." Pet. App. 17a (Thompson, J., dissenting). There is no internal inconsistency in the state court of appeal opinion.

Respondent mischaracterizes petitioner's discussion of the "branding" test as an alternative to the *Williams/Flynn* test. See Pet. Br. 33-35. He asserts, "the State argues that because the 'branding' standard is an alternate test for inherent prejudice, the state-court decision was not contrary

to or an unreasonable application of the *Williams/Flynn* principle." Resp. Br. 26. Rather, as petitioner has contended, the Ninth Circuit's analysis fails under its own precedent, because the Ninth Circuit *itself* considers the "branding" language to be an alternative to the *Flynn/Williams* test. Pet. Br. 34-35. The Ninth Circuit could not, in other words, logically find that the state court's "branding" language was an additional and different requirement from that set forth in the *Flynn/Williams* test. Pet. Br. 34. As petitioner expressly stated, his point was not that the two tests were equivalent, but rather that the Ninth Circuit's reasoning was unsound. Pet. Br. 35.

Last, respondent urges that "the state court properly found that an impermissible factor had come into play—a factual determination that the State would seemingly agree, is entitled to great deference from all reviewing federal courts." Resp. Br. 27. Respondent's rhetorical device reflects a misunderstanding shared by the Ninth Circuit in this case. AEDPA is a limitation on habeas relief. It is not a tool by which federal courts are authorized to impute to state courts factual, legal, or mixed[7] findings not made in order to decide if the imputed findings are contrary to or an unreasonable application of established federal law. As petitioner has made clear, the state court viewed the wearing of buttons as an impermissible factor, not the wearing of buttons in *this* case as inherently prejudicial.

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[7] We disagree with respondent that a finding that an "impermissible factor" had come into play is a factual one. Such a conclusion implicates findings of fact and law. Presumably respondent boosts the mixed finding to one of fact in an attempt to gain the greater deference given to such findings. See 28 U.S.C. § 2254(e)(1).

D. Respondent Concedes The Alleged Error Is Not Structural

Respondent acknowledges that a courtroom practice found inherently prejudicial under *Holbrook* v. *Flynn*, 475 U.S. 560, or *Estelle* v. *Williams*, 425 U.S. 501, does not warrant habeas relief unless it "'had substantial and injurious effect or influence in determining the jury's verdict,'" *Brecht* v. *Abrahamson*, 507 U.S. 619, 638 (1993) (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). Resp. Br. 33. Respondent does not dispute that the Ninth Circuit incorrectly considered such error to be structural. See Resp. Br. 33-40. But see Br. in Opp'n. to Pet. for Writ of Cert. 24 ("[T]here is no indication that the Ninth Circuit treated this error as structural"). Instead, respondent claims that "because the State waived its harmless error defense, this Court need not undertake a harmless-error review." Resp. Br. 33. Respondent also argues the error was not harmless. Resp. Br. 36-40. His arguments lack merit.

Respondent distorts petitioner's contention. We assert contrary to the Ninth Circuit's decision that an inherently prejudicial courtroom practice is not structural error. As for waiver, the State can hardly be said to "waive" the circuit court's decision that harmless error review is legally impermissible. Nor does petitioner ask this Court itself to conduct harmless error review. Assuming constitutional error exists, the Ninth Circuit should review the record for harmlessness under *Brecht* v. *Abrahamson*, 507 U.S. at 638.

Assuming any error, harmless error review is essential in this case. At trial, respondent's objection was to the buttons being worn at a jury trial as opposed to a court

trial—not that the buttons had any special significance given the evidence in the case or petitioner's self-defense claim. The defense was tongue-tied in identifying actual prejudice arising from the particular buttons worn by a few grieving relatives quietly seated in the public gallery of the court. The defense did not request that a reproduction of the button be preserved as a court exhibit. Nor did counsel for petitioner recount the extent, if any, of the jury's opportunity to discern the photograph on the buttons in that particular courtroom. Counsel for petitioner neither described the photograph of Tom Studer, nor sought testimony from any juror or court officer concerning the visibility of the buttons. The trial judge, who viewed the buttons, noted that no legend appeared on them, just the photograph, and that they were not prejudicial to petitioner. J.A. 4; see Pet. Br. 38-39.

Respondent's argument reduces to a repetition of his claim that buttons depicting a homicide victim when worn by courtroom spectators are inherently prejudicial. See Resp. Br. 36-40. But *Deck* v. *Missouri*, 544 U.S. 622, 635 (2005), made clear that the inherently prejudicial feature of an impermissible courtroom practice, even one that is seen by the jury, does not amount to actual prejudice. It instead shifts the burden to the State of establishing harmlessness. The Ninth Circuit's conclusion that the alleged error was structural requires reversal.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Dated: September 25, 2006

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IN THE

Supreme Court of the United States

THOMAS L. CAREY, Warden,

Petitioner,

vs.

MATHEW MUSLADIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In the absence of controlling Supreme Court law, did the Court of Appeals for the Ninth Circuit exceed its authority under 28 U. S. C. § 2254(d)(1) by overturning respondent's state conviction of murder on the ground that the courtroom spectators included three family members of the victim who wore buttons depicting the deceased?

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IN THE

Supreme Court of the United States

THOMAS L. CAREY, Warden,

Petitioner,

vs.

MATHEW MUSLADIN,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the all too familiar problem of a federal habeas court failing to accord the appropriate deference due to a state court opinion under 28 U. S. C. § 2254(d). The Ninth Circuit found that the state court's decision was an unreason-

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

able application of clearly established federal law based largely on a Ninth Circuit precedent, despite a large body of case law from other states consistent with the state court decision. This is contrary to the intent of Congress, the integrity of state court convictions, and the principle that the state courts and lower federal courts are coequal interpreters of the federal Constitution. This decision is contrary to the interests of justice and public safety that the CJLF seeks to advance.

SUMMARY OF FACTS AND CASE

In 1994, Mathew Musladin had a violent confrontation with his estranged wife, Pamela Musladin, her brother, Michael Albaugh, and her fiancé, Thomas Studer, at the home of her mother. See *People* v. *Musladin*, No. H015159 (Cal. App., Dec. 9, 1997), App. to Pet. for Cert. 55a-56a. He claimed self-defense, *id.*, at 58a, but the jury rejected that claim and convicted him of the murder of Mr. Studer, attempted murder of his wife, and assault with a deadly weapon on Mr. Albaugh.

At trial, defense counsel asked the court to require members of the Studer family to remove buttons with a picture of Tom Studer. After noting that the buttons had no message but the photograph, the trial court denied the motion, finding no prejudice to the defendant. See J. A. 3-5. On appeal, the California Court of Appeal for the Sixth District rejected the claim, see App. to Pet. for Cert. 75a, and affirmed. See *id.*, at 78a. The California Supreme Court denied review. See *id.*, at 79a.

Musladin filed a state habeas petition in the California Supreme Court on June 16, 1999, which was denied June 2, 2000. See *id.*, at 81a; Order Denying Writ of Habeas Corpus in *Musladin* v. *LaMarque*, No. C00-1998 U. S. Dist. (ND Cal., May 14, 2003), App. to Pet. for Cert. 33a. He immediately filed a federal habeas petition. See *ibid.* The Federal District Court rejected the claim, finding the case distinguishable from *Norris* v. *Risley*, 918 F. 2d 828, 834 (CA9 1990). See App. to

Pet. for Cert. 48a-49a. A divided panel of the Court of Appeals reversed. *Musladin* v. *LaMarque*, 427 F. 3d 653 (CA9 2005). The full court denied rehearing en banc, with seven judges dissenting. See *Musladin* v. *LaMarque*, 427 F. 3d 647 (CA9 2005). This Court granted certiorari on April 17, 2006.

SUMMARY OF ARGUMENT

The error in the Court of Appeals' opinion in this case is a common one. It occurs in several areas of law. Given a rule that limits a remedy to violations of clearly established law, the court evaded that limitation by defining the established law at an excessively high level of generality.

The state court decision in this case was consistent with a large body of jurisprudence from other jurisdictions. Every court in every state confronted with similar facts—spectator displays which were remembrances of the deceased with nothing more—has held that the practice was not inherently prejudicial so as to require reversal without a showing of prejudice.

This is a case where the clearly established law in this Court's cases consists of only a general principle and specific factual examples, none of which is on point. In such a case, the state court must develop a particularized rule from that principle. Where the particularized rule is consistent with a large body of jurisprudence from other jurisdictions, it is *per se* not an unreasonable application of the clearly established law. While an "outlier" decision may sometimes be unreasonable, the mainstream of jurisprudence cannot be. The outlier here is the Ninth Circuit.

ARGUMENT

I. The Court of Appeals determined the "clearly established federal law" at an excessively high level of generality.

The Court of Appeals' error in this case is one that has become all too familiar. Faced with a rule that limits a particular remedy to violations of clearly established law, the Court of Appeals sidestepped the limit by defining the established law at such a high level of generality as to render the limitation meaningless. This Court has reversed similar rulings many times in three different areas of law: the qualified immunity doctrine in suits under 42 U. S. C. § 1983, the habeas corpus retroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), and the deference standard of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2254(d).

There are two primary Supreme Court opinions establishing rules related to this case: *Estelle* v. *Williams*, 425 U. S. 501 (1976) and *Holbrook* v. *Flynn*, 475 U. S. 560 (1986). *Holbrook* distinguished practices that are "inherently prejudicial" from those that are not. 475 U. S., at 568. Inherently prejudicial practices require "close scrutiny," *ibid.*, and "should be permitted only where justified by an essential state interest specific to each trial." *Id.*, at 568-569. On the other hand, "if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the [federal constitutional] inquiry is over." *Id.*, at 572.

Although *Holbrook* establishes the rules for dealing with those practices that are inherently prejudicial and those that are not, it does not establish a clear rule for determining which category a particular practice falls into. We know from *Estelle* that compelled wearing of jail garb is inherently prejudicial. See 425 U. S., at 503-505; *Holbrook*, 475 U. S., at 568. We also know from *Holbrook*, *supra*, at 568 and *Illinois* v. *Allen*, 397 U. S. 337 (1970), that shackling the defendant in the guilt

phase of a trial is also in this category. It was not until 2005, long after the state court decision in the present case, that *Deck* v. *Missouri*, 544 U. S. 622, 635 (2005), determined that shackling in the penalty phase of a capital case also fell into the same category. On the other hand, we know from *Holbrook*, *supra*, at 569, that the presence of a substantial and visible security force is not inherently prejudicial.

The distinction between the general standard on the handling of inherently prejudicial practices and the particularized question of whether a given practice is inherently prejudicial is a level of generality problem similar to the problems this Court has addressed in a number of cases. Although qualified immunity, the *Teague* rule, and the AEDPA deference standard have important differences, they have two important aspects in common. First, each doctrine is a limit placed on a remedy that either Congress or this Court has found is particularly costly and intrusive and therefore should not be extended to every case where a court determines there has been a violation. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 925, 938-939, 958 (1998). Second, each one involves a determination of whether the law at some earlier time clearly prohibited the act or practice complained of.

Anderson v. *Creighton*, 483 U. S. 635, 639 (1987), a qualified immunity case, recognized the connection between "the level of generality at which the relevant 'legal rule' is to be identified" and the effectiveness of the remedy limitation in achieving its purpose. Abstract requirements such as due process are clearly established, but defining the relevant rule at this level would "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability . . . ." *Ibid.* For the limitation to achieve its purpose, "the right the official is alleged to have violated must have been 'clearly established' in a *more particularized*, and hence more relevant, sense . . . ." *Id.*, at 640 (emphasis added).

This particularization requirement has been recognized in several qualified immunity cases since *Anderson*. *Wilson* v. *Layne*, 526 U. S. 603, 614 (1999), held that bringing media "ride alongs" on a search of a private home was a violation of the Fourth Amendment. However, there was no sufficiently specific precedent on the particular point, it was not obvious from general principles, and the body of precedent that did exist was inconclusive. See *id.*, at 615-616; see also *Saucier* v. *Katz*, 533 U. S. 194, 202 (2001) (quoting *Anderson* "particularized" language).

Two terms ago, *Brosseau* v. *Haugen*, 543 U. S. 194 (2004) (*per curiam*), found these principles clear enough to warrant a summary reversal. Although the generalized rule against shooting nondangerous fleeing suspects was clearly established, see *id.*, at 197, there was no particularized precedent that a recklessly driving suspect came within this rule, nor was it obvious. See *id.*, at 199-200.

Sawyer v. *Smith*, 497 U. S. 227, 236 (1990), applied the *Anderson* principle to the *Teague* rule for retroactivity on habeas. Preexisting rules that lent general support to a later rule or that made it a predictable development were not enough to say that the later rule had been dictated by the earlier precedent. "In the petitioner's view, *Caldwell*[2] was dictated by the principle of reliability in capital sentencing. But the test would be meaningless if applied at this level of generality." *Ibid.*; see also *Wright* v. *West*, 505 U. S. 277, 311-313 (1992) (Souter, J., concurring in the judgment) (summarizing cases); *Gray* v. *Netherland*, 518 U. S. 152, 169 (1996) (quoting *Sawyer*); *Beard* v. *Banks*, 542 U. S. 406, 416 (2004) ("high level of generality").

Lockyer v. *Andrade*, 538 U. S. 63 (2003), applied similar reasoning in an AEDPA case. In an Eighth Amendment proportionality challenge to a term of years, the only law that

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2. *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985).

was "clearly established" was a general principle that such sentences could not be grossly disproportionate. See *id.*, at 72. The precise contours of this principle were unclear. See *id.*, at 72-73. *Solem* v. *Helm*, 463 U. S. 277 (1983), and *Rummel* v. *Estelle*, 445 U. S. 263 (1980), stood as examples of sentences that did and did not violate the general principle, respectively, but neither was on point with the facts of *Andrade*. See 538 U. S., at 74. Given only a broad general principle and no particularized precedent applicable to the case before it, the California Court of Appeal's decision was neither contrary to nor an unreasonable application of that broad principle. See *id.*, at 73-74, 77. *Yarborough* v. *Alvarado*, 541 U. S. 652, 664 (2004), also discussed the effect of the generality of the rule on the leeway given state courts under § 2254(d)(1).

Throughout these "level of generality" cases, the Court has always recognized that some actions may be such an obvious violation of a general principle that the law against them may be considered clearly established even in the absence of a particularized rule or a case factually on point. For this principle to apply, "in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U. S., at 640.

Such flagrant violations are rare. "The easiest cases don't even arise." *United States* v. *Lanier*, 520 U. S. 259, 271 (1997) (internal quotation marks omitted). Even in *Hope* v. *Pelzer*, 536 U. S. 730 (2002), the Court did not clearly state it had found such a violation. Hope, a prisoner, was tied to a hitching post, shirtless, all day in the Alabama summer sun. See *id.*, at 734-735. The Court noted, "*Arguably*, the violation was so obvious that our own Eighth Amendment cases gave respondents fair warning that their conduct violated the Constitution." *Id.*, at 741 (emphasis added). Without resolving that question, the Court proceeded to find the law clearly established by circuit court and administrative authorities. See *id.*, at 741-

746.[3] If the egregious facts of *Hope* are close to the line, as the opinion implies, then *only* egregious actions are such obvious violations of general principles that the law against them can be considered clearly established without particularized rules or precedents factually on point.

The "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U. S. C. § 2254(d)(1), is that "*certain* practices," *Holbrook*, 475 U. S., at 568 (emphasis added), designated "inherently prejudicial," *ibid.*, require "close scrutiny," *ibid.*, and excuse a defendant from the otherwise required showing of actual prejudice. See *id.*, at 572. The decision of the state court in the present case is not contrary to any precedent of this Court holding that allowing spectators to wear buttons is such a practice; there is no such precedent. We have the examples of *Holbrook* and *Estelle* on their facts, *Holbrook*'s statement that shackling is such a practice, and the general principle in *Holbrook* that the category includes practices "so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial . . . ." See *ibid.* Does the practice in this case so obviously qualify for that definition that no more specific precedent is needed? To illuminate that question, a survey of the legal landscape is helpful.

II. The state court's decision was consistent with a substantial body of jurisprudence.

In habeas cases involving the retroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), the "first and principal task is to

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3. Circuit precedent can clearly establish the law for the purpose of the qualified immunity doctrine. See *ibid.* Circuit precedent cannot clearly establish the law for the purpose of 28 U. S. C. § 2254(d)(1). The status of circuit precedent for the purpose of the *Teague* rule has never been squarely resolved. It would seem, though, that a rule cannot be dictated by a precedent the state court has no obligation to follow. See Scheidegger, *supra*, at 938-939, n. 362.

survey the legal landscape as of [the] date [of finality], to determine whether the rule [in question] . . . was dictated by then-existing precedent . . . ." *Lambrix* v. *Singletary*, 520 U. S. 518, 527 (1997). As we will explain in Part III, *infra*, in cases under § 2254(d) where there is no Supreme Court case on similar facts, it may be useful to take such a survey to see how other courts have treated similar cases.

The Kansas Supreme Court has repeatedly rejected claims that spectator conduct similar to that in the present case is inherently prejudicial and warrants reversal without a showing of prejudice. In *State* v. *McNaught*, 238 Kan. 567, 713 P. 2d 457 (1986), members of Mothers Against Drunk Driving (MADD) and Students Against Drunk Driving (SADD) wore buttons with their organizations' initials in the courtroom. See *id.*, at 576-577, 713 P. 2d, at 466. The number of such spectators was disputed, but on the prosecution's version of the facts there were three or four, so the number was comparable to or greater than the present case. See *id.*, at 580, 713 P. 2d, at 468. The court held that the spectators' wearing of these buttons was insufficient to show an abuse of discretion or to warrant reversal, see *id.*, at 581, 713 P. 2d, at 468, rejecting the claim of inherent prejudice.

State v. *Bradford*, 254 Kan. 133, 134, 864 P. 2d 680, 682 (1993), like the present case, was a homicide where the victim's family wore buttons with her picture. Although the trial court directed the spectators to remove the buttons, the jury had already seen them. Defendant claimed a mistrial should have been granted, relying on the first *Norris* opinion, *Norris* v. *Risley*, 878 F. 2d 1178 (CA9 1989). *Bradford*, *supra*, at 141-142, 864 P. 2d, at 686-687. The Kansas Supreme Court rejected the argument, holding that the case was controlled by *McNaught*. See *ibid.* This holding eliminates any doubt that the Kansas Supreme Court concluded that its *McNaught* rule is consistent with the federal constitutional requirements of *Estelle* v. *Williams*, 425 U. S. 501 (1976), and *Holbrook* v. *Flynn*, 475 U. S. 560 (1986), which were the basis of *Norris*.

State v. *Speed*, 265 Kan. 26, 961 P. 2d 13 (1998), is even more factually similar to the present case. Members of the victim's family wore buttons with his picture and later wore t-shirts with his picture. The trial court refused to order the spectators to remove the buttons and t-shirts. See *id.*, at 47-48, 961 P. 2d, at 29. The Kansas Supreme Court stated that "the wearing of such buttons or t-shirts is not a good idea because of the possibility of prejudice" and "it would have been better for the district court to have ordered the buttons removed or the t-shirts covered up." However, reversal was not required under the *McNaught* standard because "the defendant has failed to show that his rights were prejudiced by the spectators' display." *Id.*, at 48, 961 P. 2d, at 30.

The North Carolina Supreme Court confronted the picture-button question in *State* v. *Braxton*, 344 N. C. 702, 709-710, 477 S. E. 2d 172, 176-177 (1996). The defendant argued that spectators' wearing of badges with pictures of the victim was inherently prejudicial. The court rejected the argument, finding the case distinguishable from cases where buttons convey a specific message or identify a well-known group, including *Norris*, *Woods* v. *Dugger*, 923 F. 2d 1454 (CA11 1991), and *State* v. *Franklin*, 174 W. Va. 469, 327 S. E. 2d 449 (1985). *Woods* and *Franklin* are discussed below.

Picture button claims were rejected on sparse appellate records in *Cagle* v. *State*, 68 Ark. App. 248, 251, 6 S. W. 3d 801, 803 (1999), and *Kenyon* v. *State*, 58 Ark. App. 24, 34-35, 946 S. W. 2d 705, 710-711 (1997). Both decisions hold that an affirmative showing of an impact on the jury's ability to fairly decide the case is required.

The Texas Court of Appeals found the wearing of large buttons with a picture of the deceased not to be inherently prejudicial in *Nguyen* v. *State*, 977 S. W. 2d 450, 457 (Tex. App. 1998). The court noted the inherent versus actual prejudice distinction, citing *Howard* v. *State*, 941 S. W. 2d 102, 117 (Tex. Crim. App. 1996), which in turn discusses *Holbrook*.

The Supreme Court of Washington applied *Holbrook* and distinguished *Norris* in a situation similar to the present case in *In re Woods*, 154 Wn. 2d 400, 416-418, 144 P. 3d 607, 616-617 (2005). In *Woods*, the victim's family wore black and orange remembrance ribbons. The court found that the displays were not inherently prejudicial within the meaning of *Holbrook*, citing *Braxton* and other similar cases. The court distinguished *Norris* on the ground that the displays were simple remembrances of the victim rather than implicit statements of the defendant's guilt. Twelve days later, apparently unaware of *Woods*, the Washington Court of Appeals applied *Holbrook* to a picture-button case and denied relief upon finding that the defendant had not shown prejudice. See *State* v. *Lord*, 128 Wn. App. 216, 114 P. 3d 1241 (2005).[4]

In every case in every state where the spectators' displays were simple remembrances of the victim, *i.e.*, a picture or a ribbon, the court has found the display not to be inherently prejudicial. Even when the display goes beyond remembrance, authority is mixed and depends on the facts of the case.

State v. *Franklin*, 174 W. Va. 469, 327 S. E. 2d 449 (1985) is similar to *McNaught* and *Norris* in that the display was a button of a well-known organization. *Franklin* is also one of the few button cases in which relief was granted. *Franklin* is an aggravated case, quite different from the others. The county sheriff was the president of the local chapter of MADD. While in uniform, he handed a MADD button to a prospective juror as she came in the courthouse door. See *id.*, at 474, 327 S. E. 2d, at 454. There were 10 to 30 MADD members present throughout the trial. See *ibid.* Under these circumstances, the court found that the spectators were a formidable influence, and, in combination with the activities of the sheriff, constituted reversible error. See *id.*, at 475, 327 S. E. 2d, at 455.

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4. The Washington Supreme Court granted review in *Lord* on May 4, 2006, after this Court had granted certiorari in the present case. See 156 Wn. 2d 1038.

The active involvement of the sheriff distinguished the case from other spectator cases. See *ibid.*[5]

Woods v. *Dugger*, 923 F. 2d 1454 (CA11 1991), is similarly distinguishable. Where a police or correctional officer is the victim, a heavy presence of officers in uniform as spectators can send a message similar to the MADD buttons. However, *Woods* did not find inherent prejudice from the presence of the officers alone, but only in the total circumstances of a heavily publicized murder of a correctional officer in a small county with a large prison. See *id.*, at 1456-1460.

Norris v. *Risley*, 918 F. 2d 828 (CA9 1990), is extensively discussed in the other briefs and opinions in this case and need only be mentioned here. That decision found that the presence of spectators wearing "Women Against Rape" buttons, without more, constituted an inherently prejudicial practice within the meaning of *Holbrook*. See *id.*, at 834.

Our survey of the cases finds that the Ninth Circuit stands alone in this view. No other court has found that the presence of spectators wearing a button or uniform constituted inherent prejudice except in the presence of additional factors. No court under any circumstance has found that buttons or ribbons that merely indicate remembrance of a deceased victim, with no other implication as to the guilt of the defendant, was inherently prejudicial. Numerous courts have found to the contrary.

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5. We have omitted from the survey the button cases where trial counsel did not object. Although these cases deny relief, the prejudice standard required is influenced by issues of procedural default or ineffective assistance not present in this case. See *United States* v. *Sheffey*, 57 F. 3d 1419, 1432 (CA6 1995); *Pachl* v. *Zenon*, 145 Ore. App. 350, 359-360, 929 P. 2d 1088, 1093 (1996); see also *Johnson* v. *Commonwealth*, 259 Va. 654, 676, 529 S. E. 2d 769, 781-782 (2000) (court ruling at beginning of trial that buttons not be worn where jurors could see them; no further objection by counsel).

III. Where a state decision derives a particularized rule from general principles in this Court's precedents, a rule supported by substantial authority in numerous jurisdictions is *per se* a reasonable application within the meaning of AEDPA.

Since Congress enacted 28 U. S. C. § 2254(d)(1) and this Court defined its meaning in *Williams* v. *Taylor*, 529 U. S. 362, 412-413 (2000), reversing federal court of appeals decisions for failure to give state court decisions their legally required deference has taken up an inordinate portion of this Court's docket. Many of these decisions were so clearly erroneous as to warrant summary reversal. See *Bell* v. *Cone*, 535 U. S. 685 (2002); *Early* v. *Packer*, 537 U. S. 3 (2002) *(per curiam)*; *Woodford* v. *Visciotti*, 537 U. S. 19 (2002) (*per curiam*); *Lockyer* v. *Andrade*, 538 U. S. 63 (2003); *Price* v. *Vincent*, 538 U. S. 634 (2003); *Yarborough* v. *Gentry*, 540 U. S. 1 (2003) (*per curiam*); *Mitchell* v. *Esparza*, 540 U. S. 12 (2003); *Middleton* v. *McNeil*, 541 U. S. 433 (2004) (*per curiam*); *Yarborough* v. *Alvarado*, 541 U. S. 652 (2004); *Bell* v. *Cone*, 543 U. S. 447 (2005) (*per curiam*); *Brown* v. *Payton*, 544 U. S. 133 (2005); *Kane* v. *Garcia Espitia*, 546 U. S. __, 126 S. Ct. 407, 163 L. Ed. 2d 10 (2005) (*per curiam*).

Regrettably, experience has shown that the *Williams* Court's confidence in the ability and willingness of the lower federal courts to apply its generalized requirement of reasonableness accurately and faithfully was overly optimistic. Some clearer and more objectively defined rules are needed if the goals of the legislation are to be achieved. *Amicus* CJLF does not propose any universal rule for all § 2254(d)(1) cases. However, this case presents a frequently recurring situation that does lend itself to a clear and easily applied rule that is well within the language and intent of the statute and consistent with this Court's precedents.

The only clearly established Supreme Court case law relevant to this case is a general principle with a few specific examples provided by the facts of the Supreme Court cases

themselves. The present case lends itself to a particularized rule, but none appears to date in Supreme Court cases. However, the fact pattern is common enough that a number of courts, both state and federal, have ruled on the question. Specifically for this case, the particularized rule is whether spectators wearing buttons or ribbons in remembrance of a deceased victim is, without more, an inherently prejudicial practice within the meaning of *Holbrook* v. *Flynn*, 475 U. S. 560 (1986).

Caspari v. *Bohlen*, 510 U. S. 383 (1994), showed the importance of a survey of the legal landscape, including *both state and federal* decisions, when Supreme Court precedent alone provides no clear answer. A substantial split of authority means that neither branch is dictated by precedent, the ultimate resolution of the split is "a 'developmen[t] in the law over which reasonable jurists [could] disagree,' *Sawyer* v. *Smith*, 497 U. S. 227, 234 (1990), [and] the Court of Appeals erred in resolving it in [the habeas petitioner's] favor." *Id.*, at 395. In the same way, a decision consistent with a substantial body of jurisprudence cannot be said to be objectively unreasonable.

This is not to say that a single precedent may immunize a decision from being considered objectively unreasonable. The judicial system is not perfect, and even reasonable judges may occasionally make decisions that can be seen to be clearly wrong based on established law. Yet if any decision on the particularized rule relevant to this case is an "outlier" and potentially in the realm of "objectively unreasonable," it is the Ninth Circuit's decision in *Norris*, as explained in Part II, *supra*.

Amicus CJLF submits that this Court should adopt a clear standard for the application of § 2254(d)(1) in the circumstances of this case, making explicit what is implied by *Price*, 538 U. S., at 643. When a state court must derive a particularized rule from a general principle in this Court's precedents, and when a survey of the legal landscape reveals a substantial

body of jurisprudence consistent with that rule, the rule is *per se* not an unreasonable application of the precedents.

Two red herrings in the federal court opinion can be easily disposed of. The fact that the state court chose to distinguish rather than reject *Norris* v. *Risley*, 918 F. 2d 828 (CA9 1990), see App. to Pet. for Cert. 74a-75a, does not elevate that decision to the status of a Supreme Court precedent for the purpose of AEDPA. Cf. *Musladin*, 427 F. 3d, at 657-658. The Congress decided that only Supreme Court precedent would be dispositive on federal habeas, and the wording of the state court opinion cannot change that.

The second red herring is the federal court's contention that merely quoting the words "impermissible factor coming into play" amounts to some kind of binding admission that the "inherent prejudice" test had been met. In context, the quote is nothing more than an inartful way of discouraging trial courts from allowing buttons, something many other courts have done. Cf. *supra*, at 10. Read fairly, the opinion holds that the buttons do not constitute an inherently prejudicial practice, and that holding is what is to be measured by the AEDPA standard.

The state court of appeal that decided this case has a workload of 117 majority opinions per year per judge. Judicial Council of California: Statewide Caseload Trends, 2006 Court Statistics Report 16, available at http://www.courtinfo.ca.gov/reference/documents/csr2006.pdf (as visited June 15, 2006). The fact that an unpublished *per curiam* opinion in one of these cases contains less than artful wording is not a ground to bypass the deference standard in a game of "gotcha." Congress surely did not intend for its landmark reform to be so easily evaded.

The basic holding, however awkwardly expressed, is that the inherent prejudice standard of *Holbrook* is not met by permitting the victim's family to wear buttons with his picture. As we have shown in Part II, *supra*, that holding is consistent with the overwhelming weight of authority. Just as *Caspari* v.

Bohlen required that state court precedent be considered equally with federal for the purpose of deciding what was dictated by precedent, so should state-court authority be considered for deciding what is clearly established and what is a reasonable application for § 2254(d)(1). The weight of authority in this case makes the state court decision *per se* reasonable.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

June, 2006

Respectfully submitted,

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No. 05-785

IN THE

Supreme Court of the United States

THOMAS L. CAREY, WARDEN,
Petitioner,

v.

MATHEW MUSLADIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers as *amicus curiae* in support of respondent. Letters of consent have been filed with the Clerk.[1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of over 10,000 attorneys and more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In connection with that mission, NACDL has frequently filed *amicus curiae* briefs in this Court in cases involving the application of the Antiterrorism and Effective Death Penalty Act (AEDPA), *see, e.g.*, *Gonzalez v. Crosby*, 125 S. Ct. 2641 (2005); *Dodd v. United States*, 545 U.S. 353 (2005); *Rhines v. Weber*, 544 U.S. 269 (2005); *Pliler v. Ford*, 542 U.S. 225 (2004), and in cases implicating a criminal defendant's right to a fair trial, *see, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004).

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[1] Pursuant to Rule 37, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel contributed monetarily to the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Throughout respondent's state-court trial, the deceased's family wore buttons depicting the deceased's image in clear view of the jury. The state appellate court acknowledged that "the wearing of photographs of victims in a courtroom" constitutes an "'impermissible factor coming into play'" during a trial. Pet. App. 75a (quoting *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)). Even the State does not now contend that such practices are a proper component of a just and fair criminal trial. More to the point, this Court has squarely held that a courtroom practice creating an "unacceptable risk . . . of impermissible factors coming into play" violates a criminal defendant's right to a fair trial. *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976); *see Holbrook*, 475 U.S. at 569.

Despite the undisputed and unjustifiable harms caused by public displays of emotions by spectators, and despite this Court's square holding barring the introduction of prejudicial outside influences into the criminal trial process, the state appellate court refused to reverse respondent's conviction. On habeas review, the Ninth Circuit correctly held that (1) this Court's precedents in *Williams* and *Holbrook* "clearly established" the rule that outside influences cannot be allowed to intrude on a jury's dispassionate examination of the trial evidence, and (2) that the state court unreasonably failed to apply that rule in affirming respondent's conviction.

The judges dissenting from the denial of rehearing en banc incorrectly viewed the panel decision as deriving the "clearly established" law at issue from Ninth Circuit precedent, rather than from the precedents of this Court. Respondent's brief addresses the error in that construction of the Ninth Circuit's opinion, and NACDL will not repeat that analysis here.

We instead focus on the question whether fundamental principles of due process, and the precedents of this Court

applying those principles to the conduct of criminal trials, can reasonably be construed as authorizing the state to conduct a criminal trial infected by public displays of emotion by spectators on matters at issue in the proceeding. The answer is no. There is no conceivable version of a just and fair trial that includes the regular, deliberate intrusion of such outside influences into the trial process. Such factors are at once highly prejudicial to the disfavored party and utterly irrelevant to the trial's truthseeking function. They are also wholly unnecessary. The only justification even in theory is to allow family members to express their feelings of grief and mourning. But family members have infinite opportunities to express their emotions publicly outside the confines of the courtroom, and they are even provided the opportunity in most jurisdictions to express their emotions in the criminal justice process itself, in the context of victim impact statements during sentencing, *after* the facts have been found and guilt has been determined. There is no acceptable justification – none – for allowing spectators to convey their emotions before a jury seeking to ascertain the actual facts involved in the events that provoked whatever emotions public spectators might express.

Whether those emotions be grief, mourning, or outrage, the precedents of this Court clearly establish that they can play no permissible role in the fair adjudication of guilt or innocence. It was unreasonable for the state appellate court to conclude otherwise, as the decision below correctly held.

ARGUMENT

This Court's precedents have clearly established two closely related propositions that govern this case. First, "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *see Holbrook*, 475 U.S. at 567; *see also Patterson v. People of the State of Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."). Second, when a courtroom practice creates "an unacceptable risk" of "impermissible factors coming into play," that practice causes inherent prejudice to the defendant's right to a fair trial. *Williams*, 425 U.S. at 505; *see Holbrook*, 475 U.S. at 570.

In *Williams*, this Court unanimously concluded that the foregoing principles bar a state from forcing the defendant to wear prison garb against his will during his criminal trial. *See* 525 U.S. at 504-05; *id.* at 513 (Powell, J., concurring); *id.* at 515-16 (Brennan, J., dissenting).[2] The Court emphasized that "courts must be alert to factors that may undermine the fairness of the fact-finding process," *id.* at 503, because even though the "actual impact of a particular practice on the judgment of jurors cannot always be fully determined," there is "no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scru-

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[2] The only disagreement in *Williams* was whether the defendant's failure to object to being compelled to wear prison garb waived his right to be free from such compulsion. *See* 425 U.S. at 513 (Powell, J., concurring) ("[T]he Court opinion and the dissenting opinion essentially agree that a defendant has a constitutional right not to be so tried [i.e., in prison garb]. The disagreement is over the significance to be attributed to Williams' failure to object at trial.").

tiny." *Id.* at 504. Thus, courts must address any "possible impairment" of the right to a fair trial. *Id.* at 504. Forcing a defendant to wear prison garb creates such a "possible impairment" because it is a "constant reminder" to the jury of the defendant's status as an accused, which "may affect a juror's judgment." *Id.* at 504-05. Because prison attire is "likely to be a continuing influence [on the jury]," forcing a defendant to be tried in such attire presents "an unacceptable risk . . . of impermissible factors coming in to play." *Id.* at 505. Finally, the Court noted that while outside influences cannot always be entirely avoided – citing the example of shackles employed as "necessary to control a contumacious defendant," *id.*, upheld in *Illinois v. Allen*, 397 U.S. 337, 344 (1970) – "compelling an accused to wear jail clothing furthers no essential state policy." *Williams*, 425 U.S. at 505. The convenience of jail administrators was "no justification for the practice," and the State in that case "assert[ed] no interest whatever in maintaining the procedure." *Id.*

The Court applied the same established principles in *Holbrook* but reached the opposite result – again unanimously – upholding a state conviction where, at a trial with six co-defendants, "the customary courtroom security force was supplemented by four uniformed state troopers sitting in the first row of the spectator's section." 475 U.S. at 562. *Holbrook* begins by reiterating the most basic principle of due process in criminal trials:

> Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined *solely on the basis of the evidence introduced at trial, and not on grounds of* official suspicion, indictment, continued custody, or *other circumstances not adduced as proof at trial.*"

Id. at 567 (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)) (emphasis added).

Applying that rule, the Court in *Holbrook* recognized that the presence of four officers "sitting quietly in the first row," *id.* at 571, created at least some possibility of prejudice from an inference that the defendant was especially dangerous. *Id.* at 569. The Court emphasized, however, the existence of a "wider range of inferences that a juror might reasonably draw," especially that the officers were present simply to provide standard courtroom security. *Id.* at 571 ("Four troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings."). The strong likelihood that jurors drew that innocuous inference, rather than an inference affecting their deliberations, meant that the presence of the troopers did not create the "unacceptable risk of prejudice" requiring reversal. *Id.* What is more, even to the extent the troopers' presence did create prejudice, the Court emphasized that "the deployment of the troopers was intimately related to the State's legitimate interest in maintaining custody during the proceedings." *Id.* at 571-72; *see also id.* at 571 (despite any prejudice, "sufficient cause for this level of security could be found in the State's need to maintain custody").

Applied here, the due process and fair trial principles clearly established in *Williams* and *Holbrook* unambiguously require reversal of respondent's conviction. The public displays of emotion by spectators in respondent's trial inserted into the proceedings a continuing influence on the jury that both (a) inherently risked prejudice to respondent and (b) failed to further any essential State interest in the conduct of trial proceedings.

A. Public Displays Of Emotion By Spectators On Matters Before The Jury Are Inherently Prejudicial

One issue crucial to the disposition of this case is not in serious dispute: allowing trial spectators to insert into the trial proceedings non-verbal public displays relating to any

matter at issue in the trial is *not* a practice characteristic of a just and fair trial. This follows directly from the settled proposition that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of . . . other circumstances not adduced as proof at trial." *Taylor*, 436 U.S. at 485; *see Holbrook*, 475 U.S. at 567.[3]

The State in this case does not question that proposition – nowhere does it assert that allowing spectators to display their emotions about a case through visible buttons is a sound criminal trial practice. Equally significant, the lower courts that have addressed this issue have uniformly condemned similar practices.[4] This includes even those courts that have ultimately affirmed convictions (often for procedural reasons such as waiver, as in *Williams*) in cases involving such practices. In this very case, for instance, the California appellate court acknowledged that "the wearing of

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[3] Among other things, allowing the introduction of outside influences, such as the expression of emotions by spectators, would violate the defendant's rights under the Confrontation Clause of the Sixth Amendment because such expressions would not be subject to cross examination.

[4] *See Norris v. Risley*, 918 F.2d 828, 834 (9th Cir. 1990) (holding that "Women Against Rape" buttons worn by spectators during trial were inherently prejudicial); *United States v. Yahweh*, 779 F. Supp. 1342, 1343-44 (S.D. Fla. 1992) (holding that members of the same organization as defendants could not wear their uniforms during the trial due to the possibility that the jury would be influenced or intimidated); *People v. Pennisi*, 563 N.Y.S.2d 612, 614-17 (N.Y. Sup. Ct. 1990) (holding that the deceased's family and other spectators could not wear ribbon corsages in the courtroom as "[t]he court and/or [the] jury must not be exposed to these forms of communication"); *State v. Franklin*, 327 S.E.2d 449, 454-55 (W. Va. 1985) (holding that the wearing of "MADD" buttons by spectators was reversible error and stating that the jury should be "insulated, at least to the best of the court's ability, from every source of pressure or prejudice").

photographs of victims in a courtroom to be an 'impermissible factor coming into play,' the practice of which should be discouraged." Pet. App. 75a (quoting *Holbrook*, 475 U.S. at 570). Other cases – including many cited by the State – are to similar effect.[5]

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[5] *See, e.g., United States v. Sheffey*, 57 F.3d 1419, 1431-34 (6th Cir. 1995) (stating that appellant's argument, raised for the first time on appeal, that he was denied a fair trial due to the anti-drunk driving buttons worn by spectators raised "troubling issues"); *Cagle v. State*, 6 S.W.3d 801, 803 (Ark. Ct. App. 1999) (stating that the court was "not unsympathetic" to defendant's argument that the trial court erred in refusing to prohibit spectators from wearing buttons bearing a photograph of the victim but that it could not reach the argument on the record before it); *People v. Houston*, 130 Cal. App. 4th 279, 320 (Cal. Ct. App. 2005) ("[W]e are most concerned that spectator practices such as the wearing of buttons and placards displaying a victim's likeness at trial can be unduly disruptive to the trial process. . . . The better practice of any trial court is to order such buttons and placards removed from display in the courtroom promptly upon becoming aware of them in order to avoid further disruption."); *State v. Speed*, 961 P.2d 13, 29-30 (Kan. 1998) (stating that the wearing by spectators of buttons or t-shirts depicting the victim "is not a good idea because of the possibility of prejudice which might result" and that "it would have been better for the district court to have ordered the buttons removed or the t-shirts covered up"); *Pachl v. Zenon*, 929 P.2d 1088, 1093 & n.1 (Ore. Ct. App. 1996) (holding that trial counsel was not ineffective based on his failure to object to spectators wearing buttons bearing pictures of the victim but noting that the court was not "indicating that the wearing of buttons by spectators in a trial could never deprive a defendant of a fair trial"); *State v. Lord*, 114 P.3d 1241, 1243 (Wash. Ct. App. 2005) ("the better practice would have been for the trial court to have prohibited the buttons [bearing the victim's picture] when Lord first requested, rather than on the fourth day of trial"), *review granted*, 156 Wash. 2d 1038 (2006); *cf. Howard v. State*, 941 S.W.2d 102, 117-118 & n.14 (Tex. Crim. App. 1996) (holding that the presence of uniformed peace officers as spectators during the *penalty phase* of a capital trial in which the defendant had been convicted of murdering a state trooper was not inherently prejudicial but noting that trial courts "must carefully determine the risk and probability of prejudice in this context").

While these cases demonstrate the general judicial hostility toward courtroom displays by trial spectators relating to issues in the trial, the button displays in this case almost certainly had especially powerful effects. As the court of appeals explained, the "primary issue" in respondent's trial "was whether it was the defendant or the deceased who was the aggressor." *Musladin v. Lamarque*, 427 F.3d 653, 660 (9th Cir. 2005). The spectators' courtroom portrayal of the deceased obviously was not intended to single out the deceased as an unjust aggressor in that dispute, nor was it intended to be taken as purely neutral with respect to each actor's respective culpability. Rather, the buttons were plainly – and, to be sure, understandably – intended to convey a sense of sympathy and loss for the deceased, a remembrance of an innocent life unfairly and unjustly taken. In other words, the buttons "essentially argue[d] that [the deceased] was the innocent party and that the defendant was necessarily guilty; that the defendant, not [the deceased], was the initiator of the attack, and, thus, the perpetrator of a criminal act." *Id.* Even if there is some small chance the jury did not draw that obvious inference from the buttons, it is unreasonable to deny that the buttons imposed an "unacceptable *risk*" of such "impermissible factors coming into play." *Williams*, 425 U.S. at 505 (emphasis added).

The State argues otherwise, citing the state appellate court's observation that "the buttons were 'unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member.'" State Br. 25 (quoting Pet. App. 75a). But even on this account, the buttons plainly introduced an "impermissible factor" into the proceedings. Nobody would contend that family members could take the stand in the guilt phase of a trial and testify as to the depth of their feelings of mourning or outrage at the death of their loved one – matters wholly irrelevant to the question whether the defendant is criminally culpable and

yet likely to inflame the jury's passion to vindicate the family's loss. By the State's own theory, however, that was precisely the message conveyed by the buttons at issue here. In short, even to the extent the inference conveyed by the buttons was *exactly as the State contends*, that inference was unquestionably an impermissible factor influencing the jury's deliberations to respondent's detriment.[6]

B. Allowing Displays of Spectator Support at Criminal Trials Impedes, Rather than Furthers, Compelling State Interests

The State's ostensible interest – or lack thereof – in the courtroom practice at issue is also a factor in this Court's precedents. In *Williams*, the Court held that compelling a defendant to wear prison garb during trial did not serve any "essential state policy," and indeed the state in that case did not even assert any interest in continuing the policy. 425 U.S. at 505. In *Holbrook*, by contrast, the Court held that the

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[6] The State notes that "no evidence was adduced from any of respondent's jurors" establishing with certainty the existence of *actual* prejudice. State Br. 39. But this Court has held that such evidence is unnecessary in this context: "Whenever a courtroom arrangement is challenged as inherently prejudicial . . . the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an 'unacceptable risk is presented of impermissible factors coming into play.'" *Holbrook*, 475 U.S. at 570 (quoting *Williams*, 425 U.S. at 505); *see Sheppard*, 384 U.S. at 351-52. It is likewise irrelevant under *Holbrook* and *Williams* whether the jury was instructed not to let passion affect its verdict. *See Holbrook*, 475 U.S. at 568 ("Our faith in the adversary system and in jurors' capacity to adhere to the trial judge's instructions has never been absolute, however. We have recognized that certain practices pose such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny.'" (quoting *Williams*, 425 U.S. at 503-04)); *see also Bruton v. United States*, 391 U.S. 123, 129 (1968) ("The naïve assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.") (internal quotation marks omitted).

quiet presence of armed officers served the important state interest in maintaining custody over the defendant. 475 U.S. at 571-72.

The State in this case has identified no essential state interest served by allowing trial spectators to publicly display their emotions about a case during the trial, and there is none.

The display of support or sympathy for one side or interest in a criminal trial by spectators assuredly does not improve the truthseeking function of a trial; nobody contends otherwise. Nor is any burden on the state or the court imposed by requiring courtroom spectators to remove such displays from their attire while in attendance at trial – just as this Court's own marshals easily require spectators to remove their hats when entering the courtroom, trial court personnel can secure the removal of buttons and other impermissible insignia with the gentlest of commands.

Neither can this practice be justified by the understandable desire of family members to express their grief, as the State tacitly concedes by its silence on this point. Family members have no "right" to bring outside emotional influences to bear on the factfinding process of a trial, and their interest in expressing their grief publicly, and even within the confines of the criminal justice process, is already amply protected.

First, it is true that crime victims and their families and supporters are, like other members of the public, afforded the right of access to criminal trials.[7] This Court has unequivocally held that the First Amendment mandates that criminal

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[7] As *amici* in support of petitioner point out, several states have codified a crime victim's right to attend trial. *See* Br. of *Amici Curiae* Nat'l Crime Victim Law Inst., *et al.*, at 5 n.2.

trials be open to the public absent an overriding interest in the closure of the trial. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980). The Court reached this conclusion based on the rationale that "[f]ree speech carries with it some freedom to listen." *Id.* at 576 (describing the right to attend a criminal trial as the right to hear, see, and gather information). But "[i]n securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries." *Pennekamp v. Florida*, 328 U.S. 331, 366 (1946) (Frankfurter, J., concurring). Spectators therefore have no constitutionally protected interest in conveying messages of any kind to the jury during a criminal trial, and such conduct is inconsistent with this Court's precedents holding that jurors must reach their conclusions based solely on evidence of record. *See* Christopher R. Goddu, Comment, *Victim's "Rights" or a Fair Trial Wronged?*, 41 Buff. L. Rev. 245, 271-72 (1993) ("To avoid any chance of a miscarriage of justice, victim participation, at the trial level, should be limited to spectator access to the courtroom, and nothing more.").

Second, crime victims already have a voice at trial in the form of the prosecution. The States are charged with vindicating victims' rights. *See Johnson v. Texas*, 509 U.S. 350, 366 (1993). Prosecutors, not spectators supporting victims, are therefore the appropriate parties to enter into the trial record any evidence regarding the victim that is properly relevant to the adjudication of the defendant's guilt or innocence.

Third, this Court has also held that states may provide victims and their families and friends with a direct role in the *penalty* phase of a trial through the use of victim impact statements. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991). The federal government and all fifty states allow victim impact evidence at sentencing. *See* Joshua Greenberg, *Is Payne Defensible? The Constitutionality of Admit-*

ting Victim Impact Evidence at Capital Sentencing Hearings, 75 Ind. L.J. 1349, 1381 (2000). The use of such statements is premised on the view that when a defendant *has already been convicted*, victim impact evidence is relevant to a determination of the level of harm caused by the defendant to the community. That determination may be relevant at sentencing, but it has no bearing on the determination of guilt or innocence.

The State is thus left with literally *no justification at all* for the courtroom practice at issue here. Viewed in that light, the risk of prejudice from spectator displays of emotion is surely all the more categorically "unacceptable" – inasmuch as such displays never serve any essential state interest in the trial process, there is no reason to accept *any* risk of prejudice they may present. As shown above, of course, there is in fact a *serious* risk of prejudice from such displays – including from the very inference the State insists is the most reasonable here.

Under the fair trial and due process law clearly established by this Court's precedents, respondent was unambiguously denied his right to a trial free from outside influences potentially affecting the jury's dispassionate assessment of the record evidence in his case. The state appellate court's decision refusing to reverse his conviction was an unreasonable application of that law, as the Ninth Circuit correctly concluded.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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No. 05-785

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IN THE

Supreme Court of the United States

THOMAS L. CAREY, WARDEN
Petitioner,

v.

MATHEW MUSLADIN
Respondant.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CRIME VICTIM LAW INSTITUTE, PARENTS OF MURDERED CHILDREN, NATIONAL ORGANIZATION OF VICTIM ASSISTANCE, CRIME VICTIM'S LEGAL ASSISTANCE PROJECT AND THE MARYLAND CRIME VICTIMS' RESOURCE CENTER, INC. IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 05-785

THOMAS L. CAREY, WARDEN

Petitioner,

v.

MATHEW MUSLADIN

Respondant.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CRIME VICTIM LAW INSTITUTE, PARENTS OF MURDERED CHILDREN, NATIONAL ORGANIZATION OF VICTIM ASSISTANCE, CRIME VICTIM'S LEGAL ASSISTANCE PROJECT AND THE MARYLAND CRIME VICTIMS' RESOURCE CENTER, INC. IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE* [1]

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark

[1] Together with this brief *Amici Curiae* file letters of consent from counsel for both Petitioner and Respondent. *Amici Curiae* states that no counsel for a party authored any part of this brief, and no person or entity other than *Amici Curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; providing technical assistance to attorneys; promoting the National Alliance of Victims' Rights Attorneys; researching and analyzing developments in crime victim law; and assisting crime victims and other members of the public by providing information on crime victim law. In addition, NCVLI actively litigates issues of national importance regarding crime victims' rights in cases nationwide.

Parents of Murdered Children, Inc. (POMC), was founded by the parents of Lisa Hullinger who was murdered in 1978. POMC is a national nonprofit, self-help support organization based in Cincinnati, Ohio with chapters nationwide. Besides providing support for grieving parents and family members, POMC provides information about the criminal justice system, and seeks to make that system responsive to the needs of the victim's family.

The National Organization for Victim Assistance (NOVA) is a 501(c)(3) membership organization whose mission is to promote rights and services for victims of crime and crisis everywhere. In addition to its membership services, activities in furtherance of its mission are advocacy for victim rights and services, training and other educational resources for victim assistance and allied professionals, and direct service to victims of crime and crisis.

The Crime Victim's Legal Assistance Project (CVLAP) works to ensure that crime victims' federal and state constitutional rights to justice and due process throughout the criminal justice process are recognized, protected, and enforced. To achieve this purpose, CVLAP educates and empowers crime victims through *pro bono* legal advocacy as well as crisis response, education and outreach. CVLAP is the first organization in the country to provide crime victims

with direct *pro bono* legal representation in criminal proceedings. The United States Department of Justice has recognized CVLAP as a model legal clinic site for the nation.

The Maryland Crime Victims' Resource Center, Inc. (the "Center") is a private, non-profit organization incorporated under the laws of the State of Maryland whose mission is to ensure that victims of crime receive justice and are treated with dignity and compassion through comprehensive victims' rights and services. The Center continues the missions of the Stephanie Roper Foundation, Inc. and the Stephanie Roper Committee, Inc., as founded by Roberta and Vince Roper after the kidnapping, sexual assault, and murder of their daughter, Stephanie. For over 23 years, the Center has advocated for policy changes to the justice system and has provided assistance to victims of crime. Those policy changes have included numerous statutory enactments and the adoption of Article 47 of the Declaration of Rights to Maryland's Constitution. The Center advocates increasing the participant status for victims through enforcement of the rights of victims and the concomitant access to justice by those victims.

SUMMARY OF THE ARGUMENT

It is well established that, had he lived, Thomas Studer could have sat quietly in the courtroom throughout defendant's trial, causing no prejudice to defendant's fair trial rights. It belies both logic and the law to conclude that upon his death, the mere image of Thomas Studer became inherently prejudicial. Such conclusion requires a determination that due process, which readily accommodated the presence of crime victims during trial at this country's founding, has evolved to the point where the crime victim's presence is erased from the criminal justice system. Due process has simply not "evolved" so far. To the contrary, legislation now clearly re-recognizes that live victims, however physically devastated from the crime, may constitutionally attend the trial. A button merely displaying the image of a deceased

crime victim, worn by surviving crime victims does not create constitutional prejudice.

The decision below must be reversed.

ARGUMENT

I. CRIME VICTIMS' ATTENDANCE AT TRIAL, WITHOUT MORE, DOES NOT INFRINGE UPON DEFENDANT'S FAIR TRIAL RIGHTS.

This Court has yet to grapple with a situation involving a similar courtroom practice as is presented by the instant case. The two closest cases issuing from this Court are *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986); these cases are inapposite to the instant case. While these cases establish the general rule that some courtroom practices can rise to the level of inherent prejudice, neither case involved a courtroom practice or actor akin to those in the instant case. To the contrary, respectively, these cases dealt with the state compelling a defendant to stand trial in prison clothing, and the state placing uniformed officer in seats behind the defendant.

In a comprehensive law review article on the victim's right to attend criminal proceedings, Professors Douglas Beloof and Paul Cassell conducted a historical survey and found that, throughout the early years of this country, crime victims were routinely permitted to attend criminal trials. *See* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481 (2005). This historical right to attend trial was part and parcel of the western legal system's recognition that victims' interests were central to the criminal justice process. *See* Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & Pol'y 229, 235 (2005); Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell L. Rev. 282, 286 (2003); Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice*

Process: Fifteen Years After the President's Task Force on Victims of Crime, 25 New Eng. J. on Crim. & Civ. Confinement 21, 21-32 (1999). *See also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 127-28 (1998) (Stevens J., concurring) (citations omitted) (discussing the historical tradition of relying on the victim to bring a criminal to justice).

In line with this historical American tradition, a majority of states have explicit constitutional or statutory provisions guaranteeing a crime victim the right to attend the criminal trial of the accused.[2] In reviewing court cases interpreting these

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[2] Sixteen states have constitutional or statutory provisions that grant either an absolute or unqualified right to attend trial. *See* Alaska Const. art. I, § 24; Ariz. Const. art. 2 § 2.1(A)(3); Colo. Const. art. II, § 16a; Idaho Const. art. I, § 22; La. Const. art. I, § 25; Mich. Const. art. I, § 24; Miss. Const. art. 3, § 26A (implemented by MISS. CODE ANN. § 99-43-21); Mo. Const. art. I, § 32; Nev. Const. art. I, § 8(2); N.M. Const. art. II, § 24(A)(5); Okla. Const. art. II, § 34; Or. Const. art. I, § 42; S.C. Const. art. I, § 24(A); Tenn. Const. art. I, § 35; Utah Const. art. I, § 28(1); MONT. CODE ANN. § 46-24-106(1). An additional 11 states give victims the right to attend trial explicitly subject to exclusion for interference with the defendant's constitutional rights. *See* Ala. Const. art. I, § 6.01; Fla. Const. art. I, § 16(b); Ind. Const. art. I, § 13(b); Kan. Const. art. 15, § 15; Neb. Const. art. I, § 28; ARK. STAT. § 16-90-1103(a); CAL. PENAL CODE § 1102.6; N.H. REV. STAT. § 21-M:8-k(II)(e) (subject to both the constitutional and statutory rights of the accused); OHIO REV. CODE § 2930.09; VA. CODE §§ 19.2-11.01(4)(b), -265.01; WIS. STAT. §§ 950.04, 906.15. Approximately 10 additional states provide crime victims the right to attend trial subject to other qualifications, including the right to be present unless their testimony is affected, *see* Conn. Const. art. I, § 8; Ill. Const. art. I, § 8.1(A); Tex. Const. art. I, § 30(b); DEL. CODE ANN. tit 11 § 9407; MASS. GEN. LAWS ANN. ch. 258B § 3 preamble, the right to be present if practicable, *see* Md. Const. Decl. of Rights, art. 47; N.C. GEN. STAT. § 15A-832(c), the right to be present subject to the discretion of the court, *see* N.J. Const. art. I. ¶ 22; Wash. Const. art. I, § 35; GA. CODE ANN. § 24-9-61.1; S.D. CODIFIED LAWS § 23A-28C-1; WYO. STAT. ANN. §§ 1-40-203(b), -206, and the right to be present after testifying, *see* VT. STAT. ANN. tit. 13, § 5309, VT. R. EVID. 615 (allowing victim to remain in the courtroom following his or her testimony even if the victim will be called in rebuttal). In addition to these state provisions, Subsection (a)(3) of the

modern attendance rights, Professors Beloof and Cassell determined that, with a single problematic exception,[3] every state and federal court that has considered the issue has rejected a claim that a victim's presence at trial facially violates a defendant's constitutional rights. *See* Beloof & Cassell, *The Crime Victim's Right to Attend the Trial*, 9 Lewis & Clark L. Rev. at 527-34 (and cases cited therein).[4]

Federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, provides federal victims of crime the right "not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding."

[3] *See State v. Martinez*, 664 So.2d 1034 (Fla. Dist. Ct. App. 1995). The *Martinez* court found defendant's fair trial rights were violated, but failed to explain how any constitutional violation took place. Moreover, this intermediate appellate court decision appears to conflict with a subsequent state supreme court decision. *See Beasley v. State*, 774 So.2d 649 (Fla. 2000) (concluding that the trial court did not abuse its discretion in refusing defendant's request to sequester homicide victim's family members who would also be witnesses).

[4] *See, e.g., Willis v. Kemp*, 838 F.2d 1510, 1523 (11th Cir. 1988) (explaining that in a habeas proceeding, victim's family's presence at trial did not raise a constitutional issue); *Mathis v. Wainwright*, 351 F.2d 489 (5th Cir. 1965) (concluding that trial court's failure to sequester witnesses "does not raise a question that can be reached by federal habeas corpus, since such denial does not amount to a deprivation of appellant's constitutional rights."); *Landon v. State*, No. A-6479, 1999 WL 46543 at *2 (Alaska Ct. App. Feb. 3, 1999) (unpublished) (collecting cases); *State v. Fulminante*, 975 P.2d 75, 92 (Ariz. 1999) (explaining that in the few reported cases on this issue, a victim's constitutional or statutory right to attend trial does not facially violate defendant's constitutional rights); *Brandon v. State*, 776 S.W.2d 345, 346 (Ark. 1989) (rejecting defendant's claim that reversal was required for failure to sequester the victim because the victim properly exercised her rule-based right to attend trial); *Beasley v. State*, 774 So.2d 649, 669 (Fla. 2000) (concluding that the trial court did not abuse its discretion in refusing defendant's request to sequester homicide victim's family members who would also be witnesses); *State v. Gertsch*, 49 P.3d. 392, 395 (Idaho 2002) (refusing to consider defendant's claim that presence of victim/witness during trial violated his due process

Thus, under well-established modern law, solidly grounded in American history, if Thomas Studer had survived the defendant's bullet he could have attended the trial.[5] In fact, had Mr. Studer survived, and been so seriously physically injured that he needed a wheelchair, or other support device, or had he survived and been visibly scarred, he could have attended the trial. This latter scenario was recently addressed by a California court, which relying in part on victim's right to be present, held that no prejudice existed where a crime

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rights because defendant did not object at trial, and allowing victims to remain in the courtroom and observe the testimony of other witnesses prior to their own testimony did not affect the defendant's due process or fair trial rights); *Wheeler v. Maryland*, 596 A.2d 78, 88 (Md. Ct. Spec. App. 1991) (stating, "Inasmuch as the rule permitting the exclusion of witnesses originated with the legislature, we can conceive of no reason why the rule cannot be modified in the same manner . . . ."); *State v. Harrell*, 312 S.E.2d 230, 236 (N.C. Ct. App. 1984) (explaining that due process does not necessarily require sequestration); *Rucker v. Tollett*, 475 S.W.2d 207, 209 (Tenn. Crim. App. 1971) (in a postconviction proceeding, stating that sequestration of a witness does not raise a constitutional issue); *State v. Beltran-Felix*, 922 P.2d 30, 34-35 (Utah Ct. App. 1996) (explaining that both prosecutor and defendant agreed that a victim's right to attend trial does not facially violate defendant's constitutional rights).

[5] In its original panel decision, the Ninth Circuit referred to Thomas Studer as the "victim"—using quotation marks. *See Musladin v. Lamarque*, 403 F.3d 1072 (9th Cir. 2005) *withdrawn and superceded without change in judgment* 427 F.3d 653 (9th Cir. 2005). The implication of such drafting is that because defendant asserted self defense there could be no victim prior to conviction. Following such logic, had Thomas Studer survived he would not have been a victim for purposes of asserting his rights. This position is contrary to California law. *See* CAL. PENAL CODE § 1102.6 (containing no requirement of conviction and defining victim as "the alleged victim of the offense and one person of his or her choosing or however many more the court may allow under the particular circumstances surrounding the proceeding"). Further, to allow the defense asserted to negate the legal status of victim would eviscerate the victim's rights. *See Bellamy v. State*, 594 So. 2d 337, 338 (Fla. Dist. Ct. App. 1992) (rejecting defendant's argument that because he asserted consent, his accuser could not be classed as a victim).

victim who was paralyzed on the right side and confined to a wheelchair was present during trial. *People v. Newman*, No. B182857, 2006 WL 1331237 (Cal. Ct. App. May 17, 2006) (unpublished). In any of these situations, this Court would have no trouble upholding the constitutionality of the crime victim's attendance.

II. THE MERE IMAGE OF THE CRIME VICTIM WORN ON A SMALL BUTTON IS NOT INHERENTLY PREJUDICIAL.

Challenged courtroom practices are reviewed to determine if "an 'unacceptable risk is presented of impermissible factors coming into play,'" and if such a factor does come into play, there may be inherent prejudice to defendant's fair trial rights. *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986) (quoting *Estelle v. Williams*, 425 U.S. 501, 505 (1976)). This Court has recognized that crime victims have interests in the criminal justice system.[6] Thus, when reviewing the acceptability of a

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[6] *See, e.g., Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (writing for the Court, Justice Kennedy acknowledged that the state and the crime victim share an interest in finality, moral judgment, and the punishment of the guilty); *Payne v. Tennessee*, 501 U.S. 808 (1991) (Scalia, J., O'Connor, J., Kennedy, J., concurring) (acknowledging the re-ascendance of the victims' rights movement, and finding no bar to allowing information that individualizes a victim at sentencing); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 428 (1979) (discussing the educational value of public trials, and noting "the victim of the crime, the family of the victim, others who have suffered similarly, . . . have an interest in observing the course of a prosecution"); *Morris v. Slappy*, 461 U.S. 1 (1983) (noting crime victims' interests in a criminal case); *Snyder v. Massachusetts*, 291 U.S. 97, 120 (1934) (stating, "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."). This Court's recognition of crime victims' interest in criminal processes is consistent with the understanding of the victim's role noted by William Blackstone, who explained, "[i]n all cases the crime includes an injury: every public offense is also a private wrong, and somewhat more:

challenged courtroom practice, a court must take into account not only a defendant's fair trial rights, but also the interests and rights of the crime victim.

In this case, a photo of the deceased crime victim was worn by Thomas Studer's mother, father, and brother, each of whom was a crime victim with the right to be present at the proceeding.[7] There were no words on the buttons, nor is there evidence that any communicative act was undertaken by Thomas Studer's family.[8] The trial court instructed the jury to not let passion or prejudice influence their verdict.[9] Further, because defendant was on trial for murder, the fact of Mr. Studer's death was not new information to the jury, as it was likely known to all in the courtroom from the moment of impaneling the jury.

This Court has recognized that crime victims are individual human beings and that such individuality has a proper place in the criminal process. *See Payne v. Tennessee*, 501 U.S. 808 (1991). In concurrence in *Payne*, Justices Souter and Kennedy made the commonsense observation that:

> Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and, after it happens,

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it affects the individual, and it likewise affects the community." 4 William Blackstone, Commentaries on the Laws of England 5 (1769).

[7] *See* CAL. PENAL CODE § 1102.6(c) (defining victim for purposes of the right to attend as, "if the victim is no longer living, two members of the victim's immediate family or however many more the court may allow under the particular circumstances surrounding the proceeding.").

[8] This lack of any additional communicative element distinguishes this case from *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), which was so heavily relied on by the Court of Appeals for the Ninth Circuit. Consequently, even assuming lower court decisions are "clearly established Federal law, as determined but the Supreme Court of the United States," for purposes of 28 U.S.C. § 2254(d)(1), the decision relied upon by the Ninth Circuit below is factually inapposite.

[9] Joint Appendix (J.A.) 3-4.

> other victims are left behind. . . . Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles; and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents.

Id. at 838-39 (Souter, J., and Kennedy, J., concurring). This Court has further stated, "'No prejudice can result from seeing that which is already known.'" *Estelle v. Williams*, 425 U.S. 501, 507(1976) (quoting *United States ex rel. Stahl v. Henderson*, 472 F.2d 556, 557 (5th Cir. 1973)).

It is *Amici*'s position that a small button, with an in-life photograph of the murder victim worn by family members of the deceased is never prejudicial. Courts confronting courtroom practices that are akin to this case—that is, family of the crime victim merely wearing an image of a deceased crime victim while alive—have routinely found no facial prejudice.[10]

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[10] *See, e.g., Palumbo v. Ortiz*, 89 Fed. Appx. 3, 2004 WL 78212 (9th Cir. 2004) (unpublished) (upholding ruling that family members wearing image of deceased victim in courtroom did not automatically result in prejudice); *State v. Speed*, 961 P.2d 13 (Kan. 1998) (finding no constitutional prejudice where family members wore buttons with image of deceased victim); *State v. Bradford*, 864 P.2d 680 (Kan. 1993) (same); *Vasquez v. State*, No. 03-99-00335-CR, 2000 WL 235156 (Tex. Ct. App. March 2, 2000) (unpublished) (same); *Johnson v. Commonwealth*, 529 S.E.2d 769 (Va. 2000), *vacated and remanded on other grounds* 544 U.S. 901 (2005) (same). Further, even where it is unclear from the record whether it was a family member or merely a spectator wearing the image, courts have held that the mere image of the deceased victim does not, standing alone, create constitutional prejudice. *See, e.g., Kenyon v. State*, 946 S.W.2d 705 (Ark. Ct. App. 1997); *People v. Houston*, 29 Cal. Rptr.3d 818 (Cal. Ct. App. 2005); *State v. Braxton*, 477 S.E.2d 172 (N.C. 1996); *Nguyen v. State*, 977 S.W.2d 450 (Tex. Ct. App. 1998). *Amici Curiae* recognize that these lower court decisions are not dispositive in light of the standard of review required under the Antiterrorism Effective Death

Despite the above, the Court of Appeals for the Ninth Circuit concluded that, upon his death, Mr. Studer's image, standing alone, transformed into something inherently prejudicial to the administration of justice.

In another procedural context, this Court admonished the Court of Appeals for the Ninth Circuit, stating "In its haste to create a novel Sixth Amendment right, the court wholly failed to take into account the interest of the victim of these crimes . . . ." *Morris v. Slappy*, 461 U.S. 1, 14 (1983). In the instant case, the Ninth Circuit has again failed to take crime victims' interests and rights into account, and in so doing has improperly expanded the meaning of constitutional prejudice. A different panel of the Court of Appeals for the Ninth Circuit recently noted that contemporary crime victims' rights are designed to remedy the criminal justice system which previously functioned "on the assumption that crime victims should behave like good Victorian children—seen but not heard." *See Kenna v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006). In contrast to this, the Ninth Circuit opinion in the instant case would ensure that crime victims cannot even be seen. Surely the United States Constitution does not impose such an extreme rule.

Penalty Act, 28 U.S.C. § 2254(d)(1). The cases do, however, demonstrate that the California court's decision was in line with other courts across the country and therefore these cases can inform the reasonableness of that decision. *See Price v. Vincent*, 538 U.S. 634, 642-43 & n. 2 (2003).

CONCLUSION

For the foregoing reasons, and for those provided by Petitioner, the decision of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* NEW JERSEY CRIME VICTIMS' LAW CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The New Jersey Crime Victims' Law Center (NJ-CVLC) is a nonprofit legal advocacy center devoted to providing *pro bono* legal assistance to crime victims in the criminal justice system and litigating issues that affect the rights of crime victims. Founded in 1992, NJ-CVLC was the first and remains the oldest crime victim law center in the United States that provides no cost services to crime victims and litigates victims' rights issues in the appellate courts. The mission of NJ-CVLC is to provide competent *pro bono* legal assistance to crime victims, and to advocate the rights of victims through appearances as *amicus curiae* in the courts on issues affecting the rights of crime victims throughout the nation.

NJ-CVLC[1] has appeared as *amicus curiae* in numerous cases in all courts of the State of New Jersey for over a decade. The matter before this Court involves an issue in which CVLC is integrally involved, and one that it has litigated previously in state court.

SUMMARY OF THE ARGUMENT

1. "[W]hen a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others,

[1] Pursuant to Rule 37, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

who may be distinctly hurt."[2] This association oftentimes includes the parents, children and spouses of homicide victims and under the authority of many state constitutional and statutory provisions, these survivors are often given special rights affordable to direct victims of crime.[3]

Criminal trials are about people; people accused of doing bad things and the people who are harmed by their acts. Courts know this; lawyers know this; and without question, juries know this. Jurors know which individuals in the courtroom are the survivors of the homicide victim. They know why they are there. They know that these individuals are present because their loved one has been murdered, and someone is standing trial in a public forum accused of the ultimate crime, the killing of another human being.

Criminal trials do not take place behind private walls or in a laboratory controlled environment. They occur in a public setting reflecting our system of democratic justice. This public setting includes the rights of those who have suffered the greatest, the homicide survivors, to be present. Their presence and association with the decedent is understood, obvious and expected. For these individuals to wear a small button with the photo of the victim is as commonly understood as is their presence. Common sense dictates this. For the lower court to determine that such a showing of association with the victim by his loved ones violates the defendant's rights to a fair trial, fails to

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[2] *Payne v. Tennessee*, 501 U.S. 808, 838 (1991) (Souter, J., and Kennedy, J., concurring).

[3] *See, e.g.*, Cal. Penal Code § 679.02(a)(3) which provides that the rights afforded to a victim of crime extend to the victim's next of kin.

demonstrate a realistic understanding that the trial and all of its participants involve real people who come into the courtroom with independent perceptions, feelings and associations. The face of the victim worn on the lapels of those who loved him is understood by jurors in a common sense fashion; not one that calls upon them to prejudge the defendant as guilty.

2. The victims' rights social movement along with the decisions of the federal and state courts throughout the United States over the last 20 years have recognized the existence and the rights of survivors of homicide. The decision of this Court in *Payne*, 501 U.S. 808, is demonstrative of this fact. In the instant matter, the Court of Appeals incorrectly accepted defendant's petition for *habeas corpus* because the decision of the state court below was not contrary to nor did it involve an unreasonable application of clearly established Federal Law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254.

ARGUMENT

I. CONDUCT AT TRIAL ON THE PART OF A HOMICIDE SURVIVOR THAT DEMONSTRATES AN ASSOCIATION WITH THE VICTIM DOES NOT CAUSE A DENIAL OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL UNLESS IT IS INHERENTLY PREJUDICIAL OR TENDS TO ERODE THE DEFENDANT'S PRESUMPTION OF INNOCENCE.

A. Crime victims are not mere spectators in the criminal justice process, and their rights must be given due weight in assessing the impact of their presence and conduct on the rights of the defendant.

Crime victims are given special status in the criminal justice system, and their rights are recognized by constitutional mandate. *See, e.g.,* Cal. Const., art. 1, § 28. Victims are entitled to be treated with dignity, respect, courtesy, and sensitivity in the criminal justice system, and these rights plus other enumerated participatory rights of victims are required to be "honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants." Cal. Penal Code § 679.01.

In the case of homicide, the rights afforded to a victim of crime extend to the victim's next of kin. Cal. Penal Code § 679.02. The court must recognize that the trial is not solely about the defendant, and if an individual is accused of causing the death of another, the court must consider the rights of the decedent's survivors to be treated with "dignity, respect, courtesy and sympathy." *Id.* The often quoted language of Justices Souter and Kennedy in their concurring opinion in *Payne v. Tennessee*, 501 U.S. 808

(1991) presents a stamp of recognition by this Court that crime victims are not mere appendages to the criminal justice process. They are an integral part of the process and the courtroom stage on which the process unfolds each day in the courtrooms throughout this nation.

> "Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death. Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles, and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents. Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt."

Id. at 838-839 (Souter, J., and Kennedy, J., concurring).

B. Conduct of a homicide survivor at trial that demonstrates an association with the victim does not cause a denial of the defendant's right to a fair trial unless it is inherently prejudicial or tends to erode the defendant's presumption of innocence.

The United States Constitution as well as the Constitution of the State of California gives every person charged

with a criminal offense, the right to a public trial by an impartial jury. (U.S. Const., amends. VI, XIV; Cal. Const., art. 1, § 15). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and the importance of their functions. . . ." *People v. Woodward*, 4 Cal. 4th 376, 385 (Cal. 1992). While the constitutional guarantee of a public trial has historically been for the benefit of the accused and that guarantee must never be compromised, the criminal justice system also serves another purpose. "[The families] of murder victims also have a stake in [seeing justice carried out]. Courts may also consider, and be sensitive to, the needs and concerns of crime victims and their families." *People v. Chatman*, 38 Cal. 4th 344, 364 (Cal. 2006). Criminal cases are often emotionally charged and impact many others beyond the defendant. Victim's family members and those affected by the victim's absence have, in the last decade, come to the forefront of the criminal justice system. In so far as the presence of the victims does not interfere with the proceedings, they do have a right and an interest in being present.

One of the unavoidable consequences of the right to a public trial is the victim's communication through silent signals or the inferences that the jury makes of those signals. *Musladin v. Lamarque*, 2005 WL 2679717 *4 (9th Cir. (Cal.)) (Kleinfeld, J., Kozinski, J., O'Scannlain, J., Tallman, J., Bybee, J., Callahan, J., and Bea, J., dissenting). "Courts cannot expect that families will always conform their behavior to the standards of trained professionals. However, the court system must function in the

face of occasionally imperfect behavior from the public." *Chatman*, 38 Cal. 4th at 365.

> "Sometimes there is a wall of brown or blue in the spectator's section, displaying that state or municipal police care a great deal about the case. Sometimes the courtroom is full of Hells Angels colors, signifying a concern for their brother in the defendant's chair. The local rape support center volunteers may crowd into the seats behind the prosecutor in a rape trial while the victim sits silently looking at the jurors through the entire trial. . . . There is nothing wrong with the jury knowing that people care about the case and the parties. . . . Public concern and public sympathy for one side or the other are part of what it means for a trial to be 'public.'

Musladin, 2005 WL 2679717 *4 (Kleinfeld, J., Kozinski, J., O'Scannlain, J., Tallman, J., Bybee, J., Callahan, J., and Bea, J., dissenting).

The question is therefore, what is the line of demarcation between what victim conduct is permissible and what is not. In *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986), the Supreme Court delineated the proper test to determine whether the conduct rises to such a level as to deprive the defendant of his sixth amendment right to a fair trial. The inquiry is whether the conduct is "so inherently prejudicial [meaning an 'unacceptable risk is presented of impermissible factors coming into play'] so as to pose an unacceptable threat of a denial of that right." 475 U.S. at 572. Impermissible factors are those that can be said to "brand the defendant with an unmistakable mark of guilt." *Id.* at 572.

The case law suggests that for a defendant to be 'branded' the conduct must be unambiguous in its advocacy. In Holbrook, a bank robbery case, several uniformed

officers were present in the courtroom, seated in the spectator section behind the bar. *Holbrook*, 475 U.S. 560. The defendant filed a *habeas corpus* petition claiming that the presence of the officers was inherently prejudicial and amounted to a denial of his sixth amendment right. The Court reversed the lower appellate court and denied the petition. The Court found that while prison clothes or shackles are an unmistakable sign of the defendant's guilt, "the presence of guards at the defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable." *Id.* at 569. The Court went on to say that the jurors could have inferred that the officers were there to ensure decorum or prevent disruptions from outside the courtroom or the jury could have inferred nothing at all from their presence.

On the other hand in *Estelle v. Williams*, 425 U.S. 501 (1976) a defendant petitioned that his right to a fair trial was undermined because he was forced to wear prison clothing at trial. The Court found that the constant reminder that the defendant is in custody can impair the jury's judgment and erode the presumption of innocence. The prison garb was a clear, "unmistakable mark of guilt" that constituted an "impermissible factor coming into play." In *Estelle*, however, the court discussed *United States ex rel. Stahl v. Henderson*, 472 F.2d 556 (5th Cir. 1973), where a defendant was charged with murdering a fellow prison inmate. In that case, the fact that the defendant was tried wearing prison clothing was not found to be prejudicial because the jury already knew or would soon inevitably learn of the defendant's incarceration. "No prejudice can result from seeing that which is already known." *Id.* at 557.

The trial court therefore has discretion to decide whether conduct on the part of victim survivors or other spectators poses such a threat and the court has the responsibility to cure the prejudice if it is found. *Chatman*, 38 Cal. 4th at 369.

> "A trial is the recreation of a human event. When the event involves life and death, the aftermath for all those affected is profound and emotions run high. Courts must be vigilant to ensure that the proper legal resolution is untainted by extraneous influence. . . . Different people manage grief, anger, loving support and other human feelings in different ways. Surely, we would not say that the mother of either the victim or of the accused should be excluded from the courtroom simply because she might act beyond the strictures of accepted legal deportment. Courts have the responsibility to manage this reality but they cannot ignore it."

Id. at 369.

In *Chatman*, the victim's mother made several outbursts during the course of the proceedings including during defendant's testimony. The outbursts however did not speak to the defendant's guilt or innocence. They did not provide the jury with any new information outside the record. "Even without observing [the mother] in person, any reasonable juror would know that the crime caused the victim's family anguish." *Id.* at 369. The court found that the outbursts were curable by the court's admonition and no prejudice was found.

Similarly, in *People v. Lucero*, 44 Cal. 3d 1006 (Cal. 1988), the victim's mother cried out just as the jury was directed to leave the courtroom for deliberation. The substance of the outburst was information outside the

record that the jury hadn't heard during the trial. The court found that the situation was "analogous to cases where a jury hears inadmissible evidence because of improper argument by the prosecutor or through the improper testimony of a witness. In such cases prejudice is not presumed. Indeed, it is generally assumed that such errors are cured by admonition [and a jury instruction to disregard] unless the record demonstrates the misconduct resulted in a miscarriage of justice." *Lucero*, 44 Cal. 3d at 1023. The court again found, just as in *Chatman*, that the jury was not prejudiced by the spectator misconduct. In fact, the court found that up to that point there had been no California cases that have reversed a judgment because of spectator misconduct. *Lucero*, 44 Cal. 3d at 1024 n.10.

The reality of a criminal trial is that it does not take place in a hermetically sealed vacuum. "There is no legitimate way for the judges to prevent spectators in a public trial from showing that they care about the case and support one side or the other, even if only by where they sit and who they look at with sympathy or hostility." *Musladin*, 2005 WL 2679717 *4 (Kleinfeld, J., Kozinski, J., O'Scannlain, J., Tallman, J., Bybee, J., Callahan, J., and Bea, J., dissenting).

There are countless impermissible inferences that the jury could make, that could be prejudicial but which the jury is instructed to ignore. Just as juries are instructed to ignore certain questions or witness answers, the jury in this case was instructed to base their decision on the facts and on the law, and not to let "sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" color their decision. It is assumed that regardless of spectator misconduct, the jury follows the instructions they are given. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

Communication from victim survivors or other spectators, whether silent signals of grief or conduct conveying solidarity do not corrode the defendant's presumption of innocence. It is clear to the jury that the defendant is not there by choice. It is clear that the state thinks he is guilty. It is clear who the victim's family is and that they mourn the loss of a loved one. Their tears and sadness and desire for justice in the courtroom do not prejudice the jury or corrode the defendant's presumption of innocence. Their participation and faith in the system is crucial to the maintenance of societal order. They cannot and should not be excluded.

The dispositive question is whether the circumstances so clearly and unambiguously send signals to the jury of the defendant's guilt that the presumption of innocence is corroded. In *Holbrook*, the presence of the uniformed guards did not send such signals. The jury could have inferred that they were there to preserve order or the jury could have inferred nothing at all. On the other hand, in *Estelle*, the prison garb was a clear and unambiguous mark of guilt that sent unmistakable signals to jury of the defendant's guilt.

In the present case, the buttons with the picture of Tom Struder do not send clear unmistakable signals to the jury of the defendant's guilt. Assuming they were visible to the jury and further assuming the jury recognizes Tom's picture, the buttons did not send any explicit messages vis-à-vis the defendant. The buttons could have conveyed the message that the family was upset and mourning his death but as the California Court of Appeal noted, they were nothing more than "the normal grief occasioned by the loss of a family member." The buttons do not suggest

or express any message in relation to Musladin's guilt or innocence.

Furthermore, the presence of the buttons are not prejudicial because just as in *Stahl*, "[n]o prejudice can result from seeing that which is already known." 472 F.2d at 557. During the trial, the jury viewed several photos of the murder scene as well as post-mortem photos. The jury, having already seen, or imminently being exposed to such powerful scenes would not have reacted to the innocuous photo of Tom on the button. The buttons in this case are not an "unmistakable mark of guilt" and therefore do not amount to an "impermissible factor coming into play." Their presence in the courtroom does not rise to the level of "inherently prejudicial" and does not deprive the defendant of his sixth amendment right to a fair trial.

II. UNDER FEDERAL LAW THE ACTION OF THE NINTH CIRCUIT COURT OF APPEALS IN GRANTING THE PETITION OF *HABEAS CORPUS* WAS NOT A PROPER EXERCISE OF FEDERAL AUTHORITY OVER A STATE COURT DECISION.

Habeas corpus should not have been granted by the Ninth Circuit Court of Appeals because the California state court decision was not contrary to nor did it involve an unreasonable application of clearly established Federal Law as determined by the Supreme Court of the United States, nor was the decision based on an unreasonable

determination of the facts in light of the evidence presented. 28 U.S.C. § 2254.[4]

The task of the Ninth Circuit Court of Appeals was to review a petition for a writ of *habeas corpus* with a limited review and a degree of deference in order to determine whether the state court acted contrary to clearly established Supreme Court precedent or whether it unreasonably applied the facts.

In 1996, Congress amended the standard that federal courts must apply to state criminal convictions in *habeas* cases. The *Musladin* petition for *habeas corpus* is governed by the Anti-Terrorism and Effective Death Penalty Act (hereinafter "AEDPA"). The AEDPA limits the source of clearly established federal law to Supreme Court cases. Under the AEDPA a writ of *habeas corpus* could not be granted unless a state court decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. As the result of the AEDPA, an appellate court can no longer reverse a state court decision merely because that decision conflicts with the United

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[4] 28 U.S.C. § 2254 provides in part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim. . . .

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

States Court of Appeals for the Ninth Circuit precedent on a federal constitutional issue. *Moore v. Calderon*, 108 F.3d 261 (9th Cir. 1997).

In the instant matter, it is not the responsibility of the Ninth Circuit Court to review the decision of the state courts, but instead to determine whether the state court acted contrary to the "clearly established Supreme Court" precedent. Furthermore, a state court decision may not be overturned on *habeas* review, because of a persuasive Ninth Circuit-based law, but rather a writ may issue only when the state court decision is "'contrary to, or involved an unreasonable application of,' an authoritative decision of the Supreme Court." *Moore*, 108 F.3d 261 (citations omitted). Under the *habeas* statute, unless a state has done something that violates clearly established Supreme Court precedent, then the petitioner is not entitled to *habeas* relief. Federal *habeas* courts are precluded from considering the decisions of the inferior federal courts when evaluating whether the state court's application of the law was reasonable.

In order to determine whether Musladin is entitled to federal *habeas* relief, the issue of whether the buttons depicting the deceased individual worn by members of the public at the trial posed a "risk of impermissible factors" that is similar to those previously found to exist in other circumstances. The relevant Supreme Court cases that the Ninth Circuit reviewed were *Estelle*, 425 U.S. 501 (permitting spectators at a rape trial to wear anti-rape buttons was a denial of the defendant's rights of due process), and *Holbrook*, 475 U.S. 560 (armed uniformed officers in the spectators' row behind the prisoner is not inherently prejudicial.).

Contrary to the mandate of the AEDPA, the Ninth Circuit did not limit its decision to a reliance on Supreme Court precedent; instead the court based its decision of the *habeas corpus* on a Ninth Circuit case, *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990). In *Norris*, the court held that the wearing of "Women Against Rape" buttons by spectators during appellant inmate's trial was so inherently prejudicial as to pose an unacceptable threat to the right to a fair trial. It was not shown that this case illustrated an unreasonable application of the Federal Law under the Supreme Court. The Ninth Circuit considers *Norris* a persuasive case, and does not follow the limitations of the AEDPA restrictions of showing the contradictory and unreasonable application of Federal law as established by the Supreme Court.

In *Mitzel v. Tate*, 267 F.3d 524 (6th Cir. 2001) the Court held that "we may not look to the decisions of our circuit, or other courts of appeals, when deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law." Similarly, the Tenth Circuit held in *Welch v. City of Pratt*, 214 F.3d 1219 (10th Cir. 2000) held that the AEDPA "restricts the source of clearly established law to [the Supreme] Court's jurisprudence" and federal courts are therefore "no longer permitted to apply our own jurisprudence." Additionally, the Seventh Circuit determined that "federal courts are no longer permitted to apply their own jurisprudence, but must look exclusively to Supreme Court case-law." In our case, the Ninth Circuit used a circuit case, not a Supreme Court case, *Norris v. Risley*, but the statute says we cannot do that, and that it must be limited to the law "as determined by the Supreme Court of the United States." Furthermore, according to *Lockyer v. Andrade*, 538 U.S. 63, 75

(2003), the state court's application of clearly established law must be "objectively unreasonable." In the instant matter, it was not.

In *Williams v. Taylor*, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000), the Supreme Court interpreted the language of AEDPA, and decided that a distinction must be made between what is "contrary to" and an "unreasonable application of" clearly established Supreme Court precedent. The Court held that for a state court's decision to be "contrary to" clearly established Supreme Court precedent, it must "arrive at a conclusion opposite to that reached by this Court on a question of law[,]" or it must face a set of "facts that are materially indistinguishable from a relevant Supreme Court precedent and" still arrive at an opposite result. *Id.* at 405.

As stated in *Williams*, the federal courts may not overturn a state court's decision simply because the courts believe that the state court applied U.S. Supreme Court precedent incorrectly. Instead, the state court's application of Supreme Court precedent must also be objectively unreasonable. *Id.* at 411. The state appellate court in the present case commented that it "considered the wearing of the photographs of victims in a courtroom to be an 'impermissible factor coming into play,' the practice of which should be discouraged," quoting the "impermissible factor" language from *Williams*.

In this case, the Ninth Circuit Court of Appeals misapplied the federal review statute and "took the concept of fairness" and permitted it to be "strained till it is narrowed to a filament." In doing so, the court failed to

"keep the balance true."[5] The decision of the Ninth Circuit handed the defendant a windfall, and in doing so, rendered the victim a "faceless stranger." *South Carolina v. Gathers*, 490 U.S. 805, 821, 109 S. Ct. 2207, 2216 (1989) (O'Connor, J., dissenting).

CONCLUSION

For the foregoing reasons, and those asserted by Petitioner and other *amici*, the decision of the Court of Appeals or the Ninth Circuit should be reversed.

Respectfully submitted,

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[5] Quoting Justice Benjamin N. Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S. Ct. 330, 338, 78 L. Ed. 674 (1934).

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No. 05-785

In the Supreme Court of the United States

THOMAS L. CAREY, WARDEN, PETITIONER,

v.

MATHEW MUSLADIN, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, INDIANA, IOWA, MISSISSIPPI, MONTANA, NEW MEXICO, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In the absence of controlling Supreme Court law, did the Court of Appeals for the Ninth Circuit exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning respondent's state conviction of murder on the ground that the courtroom spectators included three family members of the victim who wore buttons depicting the deceased?

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INTEREST OF THE *AMICI CURIAE*

This case asks whether a federal court may grant habeas relief to a state prisoner where the federal law that the state court purportedly misapplied is an opinion of a federal court of appeals. The answer to that question is No.

The Antiterrorism and Effective Death Penalty Act (AEDPA) strictly limits the grounds on which a federal habeas court may disturb a state conviction or sentence. A state court's misapplication of federal law warrants habeas relief only if the court's decision is contrary to or unreasonably applies "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In areas where this Court's precedents announce only general standards, as opposed to specific rules, § 2254(d)(1) affords state courts substantial latitude to interpret and apply those precedents in specific cases.

Disregarding the text of § 2254(d)(1) and this Court's interpretation thereof, the Ninth Circuit held that the source of "Federal law" against which state court decisions are evaluated includes not only this Court's holdings, but also the opinions of lower federal courts. The Ninth Circuit's ruling offends the *amici* States' core interests in the administration of their criminal justice systems and the finality of their criminal proceedings, and demeans state courts by presuming them less willing or able to apply federal law faithfully.

STATEMENT

State courts are as capable as federal courts of interpreting and applying the Constitution. See *Moore v. Sims*, 442 U.S. 425, 430 (1979) (observing that this Court has "repeatedly and emphatically rejected" notion that "state courts [are] not competent to adjudicate federal constitutional claims"). Consistent with this principle, AEDPA strictly limits the power of federal habeas courts to disturb state court judgments for

alleged legal error. Such error is grounds for granting habeas relief only if the state court decision is "contrary to, or involve[s] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Ninth Circuit failed to heed this deferential standard in this case.

1. Respondent Matthew Musladin was charged with murdering Thomas Studer, attempting to murder Pamela Musladin, assaulting Michael Albaugh with a deadly weapon, and burglary. Pet. App. 55a. Before opening statements, defense counsel moved the trial court to direct members of Studer's family to remove buttons featuring Studer's photograph. *Id.* at 73a-74a; J.A. 3-4. The trial court denied the motion, reasoning that there was "no legend on the buttons" and finding "no possible prejudice" to Musladin. J.A. 4; Pet. App. 73a-74a. The jury convicted Musladin on all counts. Pet. App. 55a.

2. Musladin appealed, claiming that the trial court's order violated his due process right to a fair trial. Although the record did not indicate "the size of the buttons, the number of Studer family members wearing the challenged buttons on subsequent days of the trial, [or] whether the jurors could even see and recognize the photo button[s] as depicting the murder victim," Pet. App. 74a, the state appellate court addressed the merits of Musladin's claim. The court recognized that to prevail, Musladin had to "show either actual or inherent prejudice" arising from the trial court's order. *Ibid.* (citing *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)). Musladin did not claim "actual" prejudice, so the court therefore invoked the standard for cases involving allegedly "inherent" prejudice—"'whether an unacceptable risk is presented of impermissible factors coming into play.'" Pet. App. 74a (quoting *Woods v. Dugger*, 923 F.2d 1454, 1457 (11th Cir. 1991) (which in turn quoted *Flynn*, 475 U.S. at 570)).

The state appellate court held that Musladin failed to meet this standard. In so holding, the court distinguished *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), in which spectators at a rape trial wore buttons bearing a "Women Against Rape" legend. Pet. App. 74a-75a. The Ninth Circuit in *Norris* granted habeas relief on the ground that "the button's message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence." *Norris*, 918 F.2d at 831. The appellate court concluded that the buttons worn at Musladin's trial were materially different: "The simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of [a] family member." Pe App. 75a.

3. The state supreme court denied Musladin's petition for review, and subsequently denied his petition for writ of habeas corpus. Pet. App. 79a-81a.

4. Musladin sought habeas relief in federal court, reiterating his claim that the state trial court's refusal to prohibit Studer's family members from wearing their buttons violated due process. Pet. App. 46a-49a. At that point, the factual record was more developed than it had been in the state appellate court. See J.A. 6-8 (declarations filed by Musladin's mother and trial counsel to support petition for writ of habeas corpus in state supreme court). The district court observed that three members of Studer's family wore the buttons at trial, that each button was "two to four inches in diameter," and that the family members sat "directly behind the prosecution and next to the jury." Pet. App. 48a.

The district court recognized that Musladin, to be entitled to habeas relief, had to show that the state appellate court's decision was "'contrary to, or involve[d] an unreasonable

application of, clearly established [F]ederal law, as determined by the Supreme Court of the United States.'" Pet. App. 32a (quoting 28 U.S.C. § 2254(d)(1)). The district court sought guidance from this Court's decision in *Flynn*, as had the state court, and from *Estelle v. Williams*, 425 U.S. 501 (1976), which found "an unacceptable risk of impermissible factors coming into play" when a criminal defendant appeared in court dressed in prison garb. Pet. App. 48a. The district court recognized that *Williams* involved different facts, and that "[t]he United States Supreme Court has not specifically addressed the issue of buttons in a trial courtroom." *Ibid.* Like the state appellate court, moreover, the district court concluded that the Ninth Circuit's decision in *Norris* was distinguishable, as was *Williams*: "In both [*Williams*] and *Norris*, the challenged practice related directly to the respective defendant's guilt," whereas the buttons bearing Studer's image communicated a "solidarity by the victim's family" that "did not necessarily undermine the presumption of innocence." *Id.* at 49a. Accordingly, the district court held that the state appellate court's decision neither was contrary to nor unreasonably applied federal law. *Id.* at 49a.

5. A divided panel of the Ninth Circuit reversed. Pet. App. 1a-18a. The majority began with the same broad legal principle on which the state appellate court and the federal district court had relied, *i.e.*, to prevail on his due process claim, Musladin had to show an "'unacceptable risk of impermissible factors coming into play'" at his trial. *Id.* at 6a (citing *Williams* and *Flynn*). After summarizing the facts of *Williams* and *Flynn*—which rejected a challenge to "four uniform state troopers sitting in the front row" at trial—the Ninth Circuit turned to its own prior decision in *Norris*. *Id.* at 7a-8a.

The panel concluded that *Norris* had "persuasive value" in two respects: *Norris* could be used to divine "the meaning of the federal law that was clearly established by *Williams* and

Flynn," and also to determine "whether the state court's application of that [clearly established] law . . . [was] objectively unreasonable." *Id.* at 7a. In the panel's view, because *Norris* bore "striking factual similarities" to Musladin's case and could not "reasonably be distinguished," *id.* at 9a, 13a, the state appellate court's decision did not satisfy § 2254(d)(1).

Judge Thompson dissented. Pet. App. 15a-18a. Unlike the majority, Judge Thompson found *Norris* readily distinguishable and saw little threat to Musladin from the presence of the buttons at trial.

6. The Ninth Circuit, with seven judges dissenting, denied Musladin's petition for *en banc* review. Pet. App. 20a-30a. The dissenters criticized the panel for using the Ninth Circuit's own decision in *Norris* as a source of "clearly established Federal law," explaining that such use effectively "eras[ed] the statutory phrase 'as determined by the Supreme Court of the United States'" from § 2254(d)(1). *Id.* at 20a.

SUMMARY OF ARGUMENT

The Ninth Circuit's error was twofold, corresponding to the two ways in which the court employed its own decision in *Norris*. First, as a court of appeals decision, *Norris* is not part of the "Federal law" against which state court judgments are evaluated on federal habeas review, as AEDPA limits "Federal law" to this Court's holdings. 28 U.S.C. § 2254(d)(1). Where, as here, this Court has announced the governing constitutional standard only in general terms, state courts have broad latitude to interpret and apply that standard in individual cases. Federal habeas courts may not use lower court decisions to cabin state court decisionmaking beyond the limits imposed by this Court's actual holdings.

Second, the Ninth Circuit erred by extracting from *Norris* the conclusion that the state appellate court unreasonably

applied this Court's precedents. Even if *Norris* conflicted with the state appellate court's holding—and it did not—that by itself does not make the state court's holding objectively unreasonable under § 2254(d)(1).

Amici States respectfully urge this Court to reverse the Ninth Circuit's judgment and reaffirm § 2254(d)(1)'s clear mandate that only this Court's holdings define "clearly established Federal law" on habeas review. The Court should also make clear that the presence of a contrary lower court decision cannot possibly show that the challenged state court decision unreasonably applied federal law within the meaning of § 2254(d)(1).

ARGUMENT

The Ninth Circuit committed two fundamental errors in granting habeas relief. First, the court ignored AEDPA's plain language by treating one of its own prior opinions as part of the "clearly established Federal law" against which state court decisions are evaluated on federal habeas review. Second, and relatedly, the panel used the same Ninth Circuit opinion as conclusive evidence that the state court unreasonably applied this Court's holdings. Under the proper standard, habeas relief should have been denied.

I. The Term "Clearly Established Federal Law" In 28 U.S.C. § 2254(d)(1) Is Limited To The Holdings Of This Court.

In *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986), this Court established the general principle "that certain practices attendant to the conduct of a trial can create such an 'unacceptable risk of impermissible factors coming into play,' as to be 'inherently prejudicial' to a criminal defendant." Pet. App. 6a (citing *Williams* and *Flynn*).

This is the only "clearly established Federal law" governing Musladin's claim on federal habeas review.

The Ninth Circuit, however, assigned "persuasive value" to its own decision in *Norris* in "assess[ing] . . . the meaning of the federal law that was clearly-established by *Williams* and *Flynn*." Pet. App. 7a. The panel detailed the facts and reasoning of *Norris* under the heading, "Clearly Established Federal Law," and concluded that "the state court's unreasonable application of federal law [was] its misapplication of the *Williams* test, as it was explained in *Norris*, to the facts of this case." *Id.* at 8a-9a.

In short, the Ninth Circuit considered its holding in *Norris* to be part of the governing body of "clearly established" law that may be applied on federal habeas review. This misuse of circuit precedent ignores the plain language of § 2254(d)(1) and disregards this Court's habeas jurisprudence, which affords state courts particular latitude where, as here, they apply broad standards set forth in this Court's precedents.

A. Circuit Precedent Is Not "Clearly Established Federal Law."

AEDPA strictly defines the grounds for disturbing a state criminal judgment. When a habeas petitioner alleges that the state court committed legal error, § 2254(d)(1) prohibits federal courts from granting relief unless the state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added). This Court has read the italicized limitation to mean what it quite clearly says. See, *e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) ("In other words, 'clearly established Federal law' . . . is the governing legal principle or principles *set forth by the Supreme Court* at the time the state court renders its decision.") (emphasis added); *Williams v. Taylor*, 529 U.S. 362, 413 (2000)

("Under the 'unreasonable application clause, a federal court identifies the correct governing legal principle *from this Court's decisions* but unreasonably applies that principle to the facts of the prisoner's case.") (emphasis added).

It is thus beyond dispute that this Court's decisions alone determine the content of "Federal law" for purposes of habeas review. Indeed, "clearly established Federal law" refers only to the "*holdings*, as opposed to the dicta" of this Court's decisions. *Williams*, 529 U.S. at 412 (emphasis added). And the *establishment* of such holdings must be "clear"—meaning that the holding cannot be amorphous or case-specific. See generally Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law under the Antiterrorism and Effective Death Penalty Act*, 54 Cath. U. L. Rev. 747 (2005).

These principles comport with AEDPA's purposes. "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, . . . and to further the principles of comity, finality, and federalism." *Woodward v. Garceau*, 538 U.S. 202, 206 (2003) (internal quotation marks omitted). Moreover, "Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Williams*, 529 U.S. at 404. Section 2254(d)(1) promotes these goals by "placing new constraint[s] on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus." *Garceau*, 538 U.S. at 206 (internal quotation marks omitted).

The Ninth Circuit ignored these constraints when it elevated its own decision in *Norris* to the body of "clearly established Federal law" against which state decisions are judged on federal habeas review. This was clear error. See, *e.g.*, *Chadwick v. Janecka*, 312 F.3d 597, 613 (3d Cir. 2002) ("federal courts may not grant habeas corpus relief based on the state court's failure

to adhere to the precedent of a lower federal court on an issue that the Supreme Court has not addressed") (internal quotation marks omitted), *cert. denied*, 538 U.S. 1000 (2003); *Bell v. Jarvis*, 236 F.3d 149, 162 (4th Cir. 2000) (*en banc*) ("a federal court may now grant habeas relief only if it determines that the state court decision is contrary to, or an unreasonable application of Supreme Court jurisprudence, and not circuit court precedent"), *cert. denied*, 534 U.S. 830 (2001); *Welch v. City of Pratt*, 214 F.3d 1219, 1223 (10th Cir. 2000) ("[W]hile the trial court's failure to give petitioner's requested . . . instruction may have violated Tenth Circuit law, it did not violate clearly established federal law as determined by the Supreme Court.").

B. State Courts Enjoy Substantial Latitude When Applying Supreme Court Precedent Setting Forth General Standards.

In cases like this one, where the governing precedent from this Court sets forth a general standard rather than a specific rule, federal habeas courts may not use lower court decisions to refine that standard further. On the contrary, state courts enjoy particular latitude when interpreting and applying such general standards. As this Court recently recognized,

> Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004); see also *Dunlap v. Hepp*, 436 F.3d 739, 744 (7th Cir. 2006) ("a very general rule allows for a good deal of leeway in reaching decisions").

The latitude that state courts enjoy diminishes only as this Court renders more specific holdings in later cases. But until that occurs, where "the Supreme Court has spoken only in general terms, . . . various outcomes may be reasonable applications of the Court's precedents" for habeas purposes. *Wade v. Herbert*, 391 F.3d 135, 145 (2d Cir. 2004); see generally *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous.").

This Court denied habeas relief in *Alvarado* precisely because the governing, "clearly established" law was a general standard defining "custody" for *Miranda* purposes. The Court recognized that "the custody test [was] general, and the state court's application of [Supreme Court] law" was reasonable because it "fit[] within the matrix of [the Court's] prior decisions." 541 U.S. at 665. Likewise, in *Kane v. Garcia Espitia*, 126 S. Ct. 407 (2005), the Court summarily reversed a Ninth Circuit decision granting habeas relief to a petitioner who asserted a constitutional right to law library access while representing himself at trial. The Court reasoned that its own case law established only the general right to self-representation, and concluded that because the decision establishing that right said "nothing about any specific legal aid that the State owes a *pro se* criminal defendant," habeas relief should have been denied.

Lockyer v. Andrade, *supra*, is to the same effect. The Ninth Circuit granted habeas relief, holding that the state courts had unreasonably applied precedent from this Court providing that a sentence could violate the Eighth Amendment if it was grossly disproportionate to the crime. 538 U.S. at 70. This Court reversed, reasoning that the governing Eighth Amendment standard was a general one: "[T]he only relevant clearly established law amenable to the 'contrary to' or 'unreasonable

application of' framework [was] the [Eighth Amendment's] gross disproportionality principle, the precise contours of which [were] unclear." *Id.* at 73. This meant that state courts had "broad discretion to fashion a sentence that fit[] within the proportionality principle," a discretion that the state court properly exercised in sustaining the sentence. *Id.* at 76.

Consistent with *Alvarado*, *Garcia Espitia* and *Andrade*, the courts of appeals have recognized the latitude that AEDPA affords the state courts when applying general standards set forth by this Court's precedents. See *Walker v. Litscher*, 421 F.3d 549, 557 (7th Cir. 2005) ("Confrontation Clause standards are very general, making it difficult to call a state court ruling in this area 'objectively unreasonable.'"), *cert. denied*, 126 S. Ct. 1095 (2006); *Serrano v. Fischer*, 412 F.3d 292, 300 (2d Cir. 2005) ("[W]here the governing rule remains so roughly defined, we are less likely to conclude that a given interpretation or application of Supreme Court law is 'contrary to' or an objectively 'unreasonable application of' Supreme Court precedent for purposes of § 2254(d)(1)."), *cert. denied*, 126 S. Ct. 1357 (2006); cf. *Holland v. McGinnis*, 963 F.2d 1044, 1054 (7th Cir. 1992) (in context of *Teague* bar on retroactive application of "new" rules on habeas review, recognizing that very general precedent does not compel particular outcome in subsequent case), *cert. denied*, 506 U.S. 1082 (1993).

The governing standard in this case—that due process prohibits an "unacceptable risk of impermissible factors coming into play" at trial—is general. The state appellate court correctly recognized this standard and diligently applied it to the particular facts of this case. However, rather than afford the state court the "leeway" required under the circumstances, *Yarborough*, 541 U.S. at 664, the Ninth Circuit erroneously imposed a more specific rule from its own case law. For the reasons stated above, the Ninth Circuit's approach cannot be reconciled with § 2254(d)(1).

II. Lower Court Opinions Have Limited Use in Determining Whether a State Court Unreasonably Applied Clearly Established Federal Law.

The Ninth Circuit not only raised its own decision in *Norris* to the level of "clearly established Federal law," but also took *Norris* as conclusively demonstrating that the state appellate court unreasonably applied this Court's precedents. This, too, was error.

Amici States do not contend that state and lower federal court decisions are categorically irrelevant when deciding whether a state court decision applied the holdings of this Court in an objectively unreasonable manner. Lower court opinions that are *consistent* with the challenged state court decision support, and in fact confirm, the reasonableness of the state court's judgment. Moreover, a substantial number of lower court opinions that are overwhelmingly and unanimously *inconsistent* with the state decision might possibly indicate that the decision was objectively unreasonable. But the Ninth Circuit's reliance in this case on a single court of appeals decision to conclude that the state appellate court's decision was objectively unreasonable is unfaithful to § 2254(d)(1).

Section 2254(d)(1) recognizes that more than one outcome will often be reasonable in a given case. By favoring "conventionalism over formalism," § 2254(d)(1) "takes for granted that for a given set of facts, there exists the possibility of several equally plausible outcomes." *Ward v. Sternes*, 334 F.3d 696, 703 (7th Cir. 2003). As noted above (pages 9-11, *supra*), this is especially true where the governing Supreme Court precedent sets forth general standards rather than specific rules. See *Alvarado*, 541 U.S. at 664 ("The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.").

A state court judgment fails the § 2254(d)(1) standard only if it falls outside the broad range of plausible outcomes allowed by existing Supreme Court case law. It is not enough that the federal habeas court find legal error in the state court decision. See *Andrade*, 538 U.S. at 75; see also *Brown v. Payton*, 544 U.S. 133, 143 (2005) ("Even on the assumption that the [state court's] conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review."). To exceed the range of permissible outcomes, the challenged decision must be "objectively unreasonable." *Andrade*, 538 U.S. at 75.

One way to establish the reasonableness of a state court decision is to show that other lower courts have reached the same conclusion in similar circumstances. This Court used federal and state decisions to this effect in *Price v. Vincent*, 538 U.S. 634 (2003). The petitioner in *Vincent* challenged a state supreme court decision rejecting his double jeopardy claim. To support its conclusion that the state supreme court did not apply federal law unreasonably, this Court explained that "numerous other [state and federal] courts [had] refused to find double jeopardy violations under similar circumstances." *Id.* at 643 & n.2; accord, *e.g.*, *Jackson v. Frank*, 348 F.3d 658, 665 (7th Cir. 2003) ("Although the only definitive source of clearly established federal law under the AEDPA is Supreme Court authority, . . . the determination by one of our sister circuits that a misstatement of state law alone does not vitiate a *Miranda* waiver certainly makes it more difficult to conclude that the Wisconsin Court of Appeals unreasonably applied Supreme Court authority."), *cert. denied*, 541 U.S. 963 (2004); *Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003) ("the objective reasonableness of a state court's application of Supreme Court precedent may be established by showing other circuits having similarly applied the precedent"). Consistent decisions from

other courts are persuasive, if not conclusive, evidence that the challenged state court decision applied federal law reasonably.

The same result holds even if other courts have reached divergent results in applying the same Supreme Court precedents. In such instances, the disagreement itself suggests that this Court's precedents permit more than one objectively reasonable application. This was the situation in *Kane v. Garcia Espitia*, *supra*, which denied habeas relief with the observation that "[t]he federal courts [had] split" on the disputed question. 126 S. Ct. at 408; see also *Williams v. Bowersox*, 340 F.3d at 671 (recognizing that split in lower court authority "alone suggest[ed] the [state court] did not unreasonably apply" Supreme Court precedent).

An instructive parallel might be drawn to the principles governing whether a case announces a "new" rule under *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* asks whether a new decision was in fact compelled by preexisting law (in which case it did not announce a "new" rule), a question with obvious parallels to the inquiry under § 2254(d)(1), which asks whether preexisting Supreme Court holdings compelled a particular outcome in the challenged state proceeding. In the *Teague* context, a diversity of opinion among lower courts suggests that "reasonable minds" could disagree over the proper application of preexisting precedent, and therefore that such precedent did not dictate a particular outcome. See, *e.g.*, *Butler v. McKellar*, 494 U.S. 407, 415 (1990) (citing "difference of opinion on the part of several lower courts" and "different positions taken by [certain] judges" as evidence that a legal rule "was susceptible to debate among reasonable minds"). Likewise, in the § 2254(d)(1) context, when lower courts reach divergent results when applying the same Supreme Court holdings, the fact that some such courts are in accord with the challenged state decision suggests that the decision is not unreasonable.

The converse proposition does not hold, however, and this is where the Ninth Circuit went astray. A challenged state decision is not *unreasonable* merely because another court reaches a different conclusion on similar facts. This is particularly true where the habeas petitioner marshals only one lower court opinion (or a small number) favoring his position. For this one opinion to show that a contrary outcome was unreasonable, the opinion would have to be more than objectively reasonable in its own right; it would have to reflect the *only* reasonable application of "clearly established" Supreme Court precedent. See *Billings v. Polk*, 441 F.3d 238, 247 (4th Cir. 2006) (rejecting reliance on Ninth Circuit's decision in *Norris*, recognizing that "that decision is relevant to this habeas action only insofar as it would have been objectively unreasonable under Supreme Court precedent to reach a contrary conclusion"). Reasoning again by analogy to *Teague*, the fact that a new decision is consistent with a preexisting judicial consensus does not mean that it was compelled by precedent, and thus the *only* reasonable outcome. See *Taylor v. Gilmore*, 954 F.2d 441, 446 (7th Cir. 1992) ("[T]he absence of prior contrary decisions does not necessarily indicate that a later case was beyond dispute, and hence not a new rule."), *rev'd on other grounds*, 508 U.S. 333 (1993).

The standard for issuing a certificate of appealability (COA) in habeas proceedings provides another helpful illustration. To receive the COA needed to appeal an adverse district court ruling, a habeas petitioner must show that the district court's decision would be at least debatable among reasonable jurists. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This Court has recognized that a particular legal outcome would not necessarily be unreasonable even if *every* court would ultimately reject it. See *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) ("Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been

granted and the case has received full consideration, that [the] petitioner will not prevail."). *A fortiori*, a legal position is not unreasonable merely because some small number of courts have rejected it.

The dissent from the denial of *en banc* review in this case recognized the fundamental difference between using consistent decisions from other courts to show that a challenged state court decision was reasonable, and using contrary decisions as proof that the decision was unreasonable: "[S]aying that the state court decision is not unreasonable because some federal courts have reached similar conclusions is not at all the same as saying that the state court decision is unreasonable because a circuit court has reached a contrary conclusion." Pet. App. 26a. The Ninth Circuit erred in ignoring this distinction and relying on a single circuit precedent to show that the California court applied this Court's case law unreasonably.

III. Under The Proper Standard, Musladin Was Not Entitled to Habeas Relief.

The state appellate court's decision in this case passes muster under § 2254(d)(1). The state court recognized that, under this Court's decision in *Holbrook v. Flynn*, *supra*, Musladin could prevail only if the buttons worn at his trial posed "an unacceptable risk . . . of impermissible factors coming into play." Pet. App. 74a (quoting *Woods*, 923 F.2d at 1457 (which in turn quoted *Flynn*, 475 U.S. at 570)). Even the Ninth Circuit agreed that this is the proper standard for showing "inherent prejudice" under Supreme Court case law. Pet. App. 7a.

The *Flynn* standard is set forth in general terms, and state courts therefore have substantial "leeway" to determine its reasonable application in specific cases. *Alvarado*, 541 U.S. at 664 ("The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations."). The

state appellate court acted reasonably in concluding that "[t]he simple photograph of [the victim] was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of [a] family member" and therefore presented no inherent prejudice to Musladin. Pet. App. 75a.

Contrast this with the prison garb the habeas petitioner wore during his trial in *Estelle v. Williams*, *supra*. Quite unlike the buttons at issue here, jurors in *Williams* witnessed the "constant reminder of the accused's condition implicit in such distinctive, identifiable attire." 425 U.S. at 504-505. Prison-issue clothes "are unmistakable indications of the need to separate a defendant from the community at large." *Flynn*, 475 U.S. at 569; see also Pet. App. 22a (dissent from denial of rehearing *en banc*) (whereas "prison garb is an unambiguous statement that the defendant is already a prisoner" and "a communication to the jury of the government's determination . . . that the defendant belongs in jail," the buttons worn in Musladin's case "are ambiguous" and "do not imply any determination by the government"). It was not at all unreasonable for the state appellate court to conclude that buttons mourning a victim's passing communicate no similarly prejudicial message.

The reasonableness of the state appellate court's conclusin is confirmed by the fact that many lower courts have rejected similar challenges to the wearing of buttons bearing a deceased victim's likeness at trial. See, *e.g.*, *Cagle v. State*, 68 Ark. App. 248, 251, 6 S.W.3d 801, 803 (1999), *aff'd*, 2002 WL 31628432 (Ark. Nov. 21, 2002); *State v. Speed*, 265 Kan. 26, 47-48, 961 P.2d 13, 29-30 (1998); *State v. Bradford*, 254 Kan. 133, 141-142, 864 P.2d 680, 686-687 (1993) (rejecting defendant's reliance on *Norris*); *State v. Braxton*, 344 N.C. 702, 709-710, 477 S.E.2d 172, 176-177 (1996) (distinguishing *Norris*); *Nguyen v. State*, 977 S.W.2d 450, 457 (Tex. App. 1998) ("large buttons portraying a color photograph of the deceased"), *aff'd*, 1 S.W.3d 694 (Tex. Crim. App. 1999); *State v. Lord*, 128

Wash. App. 216, 114 P.3d 1241, 1243-1245 (2005) (rejecting defendant's reliance on *Norris*), *rev. granted*, 134 P.3d 233 (Wash. 2006); see also, *e.g.*, *Buckner v. State*, 714 So.2d 384, 388-389 (Fla. 1998) (*per curiam*) (photos of victim held up by family members in court); *State v. Nelson*, 705 So.2d 758, 763 (La. App. 1997) (t-shirts with photo of murder victim), *writ denied*, 720 So.2d 677 (La. 1998); *In re Woods*, 154 Wash. 2d 400, 416-418, 114 P.3d 607, 616-617 (2005) ("remembrance ribbons" worn by victim's family) (distinguishing *Norris*). As the Supreme Court of Washington summarized, "[m]any courts have used the [*Flynn*] standard and have found that no inherent prejudice exists so as to taint the defendant's right to fair trial from the wearing of buttons or other displays." *Woods*, 154 Wash. 2d at 418, 114 P.3d at 617.

These decisions—not one of which the Ninth Circuit mentioned, let alone addressed, in this case—are powerful evidence that the state appellate court applied "clearly established Federal law" reasonably. Even if *Norris* were factually similar to this case (and it is not), in combination with the foregoing decisions it would merely illustrate just how general and open to conflicting application the governing "Federal law" is. The mere presence of *Norris* in the constellation of lower court decisions applying *Williams* and *Flynn* does not even remotely suggest, let alone establish, that the state appellate court applied this Court's holdings unreasonably.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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